LIBRARY
SUPREME COURT, U. S.

FILED
OCT 16 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1967
No. 729

SAMUEL RATNER,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA.

**Petition for a Writ of Certiorari to the Appellate Department of the Superior Court for the State of California, County of Los Angeles.**

NORMAN R. ATKINS,
BURTON C. JACOBSON,
424 South Beverly Drive,
Beverly Hills, California,

RICHARD A. LAVINE,
121 South Beverly Drive,
Beverly Hills, California,
*Attorneys for Petitioner.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

## SUBJECT INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Grounds on Which the Jurisidction of This Court Is Evoked | 2 |
| Questions Presented for Review | 4 |
| Constitutional Provisions and Statutes Involved | 4 |
| Statement of the Case | 5 |
| Description of the Material Involved | 9 |
| Reasons for Granting the Writ and Argument Amplifying Same | 11 |
| I. Certiorari Should Be Granted Because It Is the Announced Duty of This Honorable Court to Review All Decisions Wherein the Substantial Question of Free Expression Under the First Amendment of the United States Constitution Is Presented | 11 |
| II. Certiorari Should Be Granted Because the Highest Court of the State of California in Which a Decision Could Be Had in the Instant Matter Has Decided a Substantial Federal Question (First Amendment, United States Constitution) Not in Accord With Applicable Decisions of This Court | 13 |
| Conclusion | 15 |

# INDEX TO APPENDICES


| | Page |
|---|---|
| Appendix A. Order Denying Rehearing and Granting Certification | 1 |
| Order Certifying Cause to Court of Appeal | 2 |
| Appendix B. Judgment | 4 |
| Appendix C. On Appeal—Criminal | 5 |
| Application for Certification to the District Court of Appeals | 7 |
| Points and Authorities in Support of Petition for Rehearing and in Support of Application for Certification to District Court of Appeals | 9 |
| Declaration of Burton C. Jacobson in Support of Petition for Rehearing and Application for Certification to the District Court of Appeals | 22 |
| Appendix D. Rule 63. Certification | 23 |
| Appendix E. Application Denied | 24 |
| Appendix F. Defendant's Designation of Record on Appeal, and Statement on Appeal | 25 |
| Appendix G. Appellant's Opening Brief | 28 |

## TABLE OF AUTHORITIES CITED


| Cases | Page |
|---|---|
| A Quantity of Copies of Books v. Kansas, 87 S. Ct. 2104 | 12, 14 |
| Aday v. United States, 87 S. Ct. 2095 | 12, 14 |
| Alberts v. California, 354 U.S. 476, 77 S. Ct. 1304 | 4 |
| Austin v. State of Kentucky, 87 S. Ct. 1414, 386 U.S. ....., 18 L. Ed. 515 | 12, 14 |
| Avansino v. New York, 87 S. Ct. 2093 | 12, 14 |
| Books, Inc. v. United States, 87 S. Ct. 2098 | 12, 14 |
| Cobert v. New York, 87 S. Ct. 2092 | 12, 14 |
| Corinth Publications, Inc. v. Westberry, 87 S. Ct. 2096 | 12, 14 |
| Edwards v. People, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119 | 4 |
| Friedman v. New York, 87 S. Ct. 2091 | 12, 14 |
| Gent v. State of Arkansas, 87 S. Ct. 1414, 386 U.S. ....., 18 L. Ed. 515 | 12, 14 |
| Jacobellis v. Ohio, 378 U.S. 184, 84 S. Ct. 1676 | 11, 12, 13 |
| Kenney v. State of New York, 87 S. Ct. 2091 | 12, 14 |
| Kingsley International Pictures Corp. v. Regents, 360 U.S. 685 | 13 |
| Landau v. Fording, 87 S. Ct. 2109 | 12, 14 |
| Manual Enterprises, Inc. v. Day, 370 U.S. 478 | 13 |
| Mazes v. Ohio, 87 S. Ct. 2105 | 12, 14 |
| One, Inc. v. Olesen, 355 U.S. 371, 78 S. Ct. 364 | 13 |
| Ratner v. California, 87 S. Ct. 2092 | 12, 14 |
| Redrup v. State of New York, 87 S. Ct. 1414, 386 U.S. ....., 18 L. Ed. 515 | 12, 13 |

Page

Rosenbloom v. Virginia, 87 S. Ct. 2095 .....12, 14

Roth v. United States, 354 U.S. 486, 77 S. Ct. 1304 .....5, 6, 11

Schackman v. California, 87 S. Ct. 2107 .....12, 14

Sheperd v. New York, 87 S. Ct. 2093 .....12, 14

Smith v. People, 361 U.S. 147, 80 S. Ct. 215 ..... 4

Sunshine Book Co. v. Summerfield, 355 U.S. 372, 78 S. Ct. 365 ..... 13

Times Film Corp. v. Chicago, 355 U.S. 35, 78 S. Ct. 115 ..... 13

Zetlin v. Arnebergh, 59 Cal. 2d 901 ..... 13

Rules

California Rules of Court, Rule 63 ..... 3

Statutes

California Constitution, Art. VI, Sec. 4 .....3, 4

California Constitution, Art. VI, Sec. 4b .....3, 4

California Constitution, Art. VI, Sec. 5 .....3, 4

California Penal Code, Sec. 311(a) .....4, 5

California Penal Code, Sec. 311.2 .....4, 5

California Penal Code, Sec. 311.5 .....4, 5

California Penal Code, Sec. 1466 .....3, 4

United States Code Annotated, Title 28, Sec. 1257.. 3

United States Code Annotated, Title 28, Sec. 1257-(3) ..... 4

United States Constitution, First Amendment ..4, 5, 6 .....7, 11, 12, 13

United States Constitution, Fourteenth Amendment ..... 4

IN THE

# Supreme Court of the United States

October Term, 1967
No. .....

SAMUEL RATNER,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA.

**Petition for a Writ of Certiorari to the Appellate Department of the Superior Court for the State of California, County of Los Angeles.**

Petitioner, Samuel Ratner, respectfully prays for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, County of Los Angeles to review its judgment affirming the judgment of conviction of the Municipal Court for the El Monte Judicial District, County of Los Angeles, State of California, by which petitioner was sentenced to 180 days in the county jail of the County of Los Angeles on Counts 1, 2, and 3, all to run concurrently.

**Opinions Below.**

Trial in the Municipal Court, El Monte Judicial District, County of Los Angeles, State of California was by jury.

The Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirmed the judgment of the Municipal Court

of the El Monte Judicial District, County of Los Angeles, State of California, without opinion.

A Petition for Rehearing and Application for Certification to the District Court of Appeal was timely made by petitioner, and on July 6, 1967, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles made its orders denying the rehearing and granting the certification to the District Court of Appeal. The Orders denying the rehearing and certifying the cause to the Court of Appeals are appended hereto as Appendix "A".

**Grounds on Which the Jurisdiction of This Court Is Evoked.**

1. The date of the judgment sought to be reviewed is July 26, 1967. The time of entry of judgment is July 26, 1967.

2. Petitioner was convicted on the charges contained in Counts 1, 2, and 3 of a three-count complaint after jury verdict, which verdict was returned on October 18, 1966, and judgment thereon was entered on November 29, 1966, in the Municipal Court of the El Monte Judicial District, County of Los Angeles, State of California in the case captioned The People of the State of California, Plaintiff v. Samuel Ratner, Defendant and numbered M35295.

The petitioner then filed a timely notice of appeal in the Appellate Department of the Superior Court of the State of California, County of Los Angeles.

On June 8, 1967, the Appellate Department of the Superior Court of the State of California, County of Los Angeles, filed its judgment. (See Appendix "B").

Thereafter, petitioner filed a timely Petition for Rehearing and Application for Certification to the District Court of Appeal under the provisions of Rule 63 of the Rules on Transfer of Municipal and Justice Court appeals adopted by the Judicial Council of the State of California, effective January 2, 1962, appended hereto as Appendix "C". On July 6, 1967, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, denied the petition for rehearing and granted the petitioner's application for certification to the District Court of Appeal. (See Appendix "A").

The District Court of Appeal of the State of California, Second Appellate District on July 26, 1967, denied the transfer of the cause to that Court. That denial is appended hereto as "Appendix "D". The Appellate Department of the Superior Court of the State of California for the County of Los Angeles thereby became the "highest court of a state in which a decision could be had" (28 U.S.C.A. §1257).

Under the law of the State of California, a convicted defendant charged with a misdemeanor in the Municipal Court of the State of California may appeal to the Appellate Department of the Superior Court, as a matter of right. California Penal Code §1466, California Constitution, Article VI, §§ 4, 4b and 5.

No further appeal is permitted under California law, unless done pursuant to the provisions of California Rules of Court, Chapter III, Rules on Transfer of Municipal and Justice Court Appeals. Rule 63 (See Appendix "D"). Application was made pursuant to said provision (appended herein as Appendix "C") and was denied as aforesaid (See Appendix "E"),

thereby rendering the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, the "highest court of a state in which a decision could be had." *Edwards v. People,* 314 U.S. 160, 171; 62 S. Ct. 164, 165; 86 L. Ed. 119; *Smith v. People,* 361 U.S. 147, 148, fn. 2; 80 S.Ct. 215, 216 fn. 2; *Alberts v. California,* 354 U.S. 476, 481, fn. 6; 77 S. Ct. 1304, 1307, fn. 6.

3. The statutory provision which confers jurisdiction upon this court to review the judgment in question by Writ of Certiorari is 28 U.S.C.A. §1257(3).

**Questions Presented for Review.**

1. Is the booklet "Bondage Cabin" (subject matter of Count 1) obscene, or is it entitled to the protection of the First Amendment of the United States Constitution?

2. Is the motion picture "The Count" (subject matter of Count 2) obscene, or is it entitled to the protection of the First Amendment of the United States Constitution?

3. Is the advertising brochure (subject matter of Count 3) capable of being legally construed to advertise obscene material, regardless of the material, as a matter of law, or is it entitled to the protection of the First Amendment of the United States Constitution?

**Constitutional Provisions and Statutes Involved.**

Involved are the First and Fourteenth Amendment to the United States Constitution; Section 311(a) of the California Penal Code; Section 311.2 of the California Penal Code; Section 311.5 of the California Penal Code; Section 1466 of the California Penal Code; and California Constitution, Article VI, Sections 4, 4b and 5.

**Statement of the Case.**

Petitioner was charged in a three count complaint. Count 1 charged that he distributed obscene material, to wit: a booklet entitled "Bondage Cabin" in violation of California Penal Code Section 311.2. Count 2 charged that he distributed obscene material, to wit: a motion picture film entitled "The Count" in violation of California Penal Code Section 311.2. Count 3 charged that he willfully and unlawfully wrote and created advertising and otherwise promoted the sale and distribution of matter represented and held out by him to be obscene in violation of Section 311.5 of the California Penal Code.

After jury trial, petitioner was found guilty on all three counts.

The Federal question as to whether the booklet "Bondage Cabin", the motion picture "The Count" and the advertising brochure are entitled to the protection of the First Amendment of the United States Constitution was first raised in the trial court by petitioner's (defendant below) plea of not guilty to the said three count complaint. The definition of obscenity contained in California Penal Code §311(a) and the definition of obscenity enunciated in *Roth v. United States,* 354 U.S. 486, 77 S. Ct. 1304, are exactly similar. By reason of petitioner's conviction on the three counts, it was implicit in that judgment that the material in Counts 1 and 2 constituted obscene material not only under California State Law but also under the definition of obscenity contained in *Roth v. United States, supra*; and the advertising brochure in Count 3 constituted the advertising of material represented to be obscene in the advertising not only under state law but

also under the definition of obscenity contained in *Roth v. United States, supra*; and were thereby all declared not to be entitled to the protection of the First Amendment of the United States Constitution.

Thereafter, petitioner appealed the conviction of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. In petitioner's (defendant-appellant below) designation of record on appeal and statement on appeal (set out hereinafter as Appendix "F") at pages two and three thereof, petitioner set forth his grounds for appeal as follows:

> "The grounds upon which defendant relies:
>
> I
>
> The book entitled 'Bondage Cabin' upon which defendant was convicted in Count one of the amended complaint is not obscene as a matter of law, but rather is constitutionally protected material.
>
> II
>
> The motion picture film 'The Count' upon which defendant was convicted in Count Two of the amended complaint is not obscene as a matter of law, but rather is constitutionally protected material.
>
> III
>
> The advertising material which is the subject matter of Count Three cannot as a matter of law violate Section 311.5 of the Penal Code.
>
> IV
>
> The Court erred in failing to dismiss the action on the grounds that the material was constitutionally protected as a matter of law. . . ."

Petitioner also raised and presented the Federal question to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, at pages 2 and 5 of Appellant's Opening Brief (set out herein as Appendix "G") wherein appellant contended.

> "Penal Code Section 311.2 proscribes only obscene matter. If the underlying matter is not obscene, then no matter what else it might be, no crime has been committed, and the material is then protected by the First Amendment to the Constitution of the United States, and Article I, §9 of the Constitution of the State of California.
>
> "If the advertising brochure does not offer obscene material, no violation of Section 311.5 can occur. The material advertised is in no way connected with a violation of Section 311.5. It is only the advertising material itself which can constitute a violation of the statute. In other words, and to simply state the proposition, the defendant must advertise material which he represents to be obscene; and in order to do that, he must represent that his material is obscene as defined in Section 311(a) of the Penal Code."

On June 8, 1967, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirmed the judgment of conviction by the Municipal Court, El Monte Judicial District, County of Los Angeles. (See Appendix "B")

Among the issues decided by that appeal was that the materials involved in Counts 1, 2 and 3 were not entitled to the protection of the First Amendment of the United States Constitution.

Thereafter, petitioner sought to have the said Appellate Department's decision reviewed by the California District Court of Appeal.

In petitioner's "Petition for Rehearing and Application for Certification to the District Court of Appeals" (set forth hereinafter as Appendix "C"), petitioner again brought to the attention of the Appellate Department the Federal question involved by stating at page 1 thereof as follows:

> "(a) The transfer of the instant case is necessary to secure uniformity of decision in that this court's affirming decision filed June 8, 1967 is contrary to the law of the State of California as expressed in *Zeitlin v. Arnebergh,* 59 Cal 2d 901; is contrary to the test of obscenity as contained in the Penal Code of the State of California, §311(a); and is contrary to the law of the United States of America as expressed in *Roth v. United States,* 354, U.S. 476; *One, Inc. v. Olesen,* 355 U.S. 371; *Times Film Corp. v. Chicago,* 355 U.S. 35; *Sunshine Book Co. v. Summerfield,* 355 U.S. 372; *Kingsley International Pictures Corp.. v. Regents,* 360 U.S. 684; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478; *Jacobellis v. Ohio,* 84 S. Ct. 1676; *Tralins v. Gerstein,* 84 S. Ct. 1903; *Grove Press v. Gerstein,* 84 S. Ct. 190; *Winters v. New York,* 68 S. Ct. 665, and *Burstyn, Inc. v. Wilson,* 72 S. Ct. 777.
>
> "(b) To settle important questions of law involving the constitutional guarantees of freedom of speech and expression as contained in the United States Constitution, First and Fourteenth Amendments and the California Constitution, Article One, §9.

(1) Under the rule of law laid down in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, that only 'hard core pornography' is proscribed, what material is embraced within the term 'hard core pornography'?

(2) Does the material involved herein fall with the definition of the phrase 'hard core pornography'?

(3) What is the proper method of application of the definition of obscenity as contained in §311(2) of the Penal Code of the State of California?"

The Petition for Rehearing was denied by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, but the Application for Certification to the District Court of Appeal was granted (See Appendix "A"), wherein it was recognized a necessity to "settle important questions of law and to secure uniformity of decision".

The District Court of Appeal on July 26, 1967 denied the certification of the case to itself, thereby rendering the judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, final, under the law of the State of California.

**Description of the Material Involved**

1. The booklet "Bondage Cabin" (which is the subject matter of Count 1) contains two stories. The first story is entitled "Bondage Cabin" and is the story of a girl who is captured by a man living a secluded existence, who keeps her tied up and treats her

as a slave, beating her from time to time. She eventually escapes and kills her tormentor, only to subsequently be captured by a person of the same ilk. There are no scenes describing sexual activity in any way, shape or form.

The second story is entitled "Flagella". It is the story of a man who stumbles upon a hidden and secret torture worshipping society. The man is subjected to torture of all types, only to come to the realization that he enjoys this mistreatment. This story contains no scenes of sexual activity.

2. The motion picture film "The Count" (the subject matter of Count 2) deals with a mad count who has two servant maids whom he ties up and beats for the slightest of causes. There is no sexual activity between the participants or actors in the film.

3. The advertising brochure (subject matter of Count 3) is a one-page advertising piece which lists for sale various items including the booklet involved in Count 1 and the film involved in Count 2. Other than listing the items for sale with a brief description thereof, it contains no other representations concerning the materials.

## REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

### I.

### Certiorari Should Be Granted Because It Is the Announced Duty of This Honorable Court to Review All Decisions Wherein the Substantial Question of Free Expression Under the First Amendment of the United States Constitution Is Presented.

Petitioner relies on this Court's announced position with regard to the singular importance of ceaseless vigilance to safeguard and uphold the constitutional guarantee of free expression under the First Amendment of the United States Constitution. *Roth v. United States,* 354 U.S. 476, 488, 77 S. Ct. 1304, 1311.

As this Court stated most recently in *Jacobellis v. Ohio,* 378 U.S. 184, 188, 84 S. Ct. 1676, 1678:

> "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicated an issue of constitutional law. See *Roth v. United States,* supra 354 U.S., at 497-498, S. Ct., at 1315-1316 (separate opinion). Such an issue, we think, must ultimately be decided by this court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' Id., 354 U.S., at 498, 77 S. Ct. at 1316, *see Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 82 S. Ct. 1432, 1437, 8 L. Ed. 2d 639 (Opinion of Harlan, J.):

And at page 1679, the Court stated:

"Hence we reaffirm the principle that, in obscenity cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."

This Court has held that expression in the form of motion picture films is also within the ambit of the First Amendment guarantees, *Jacobellis v. State of Ohio, supra.*

See also

*Redrup v. State of New York,* 87 S. Ct. 1414, 386 U.S. ...., 18 L. Ed. 515; *Austin v. State of Kentucky,* 87 S. Ct. 1414, 386 U.S. ...., 18 L. Ed. 515; *Gent v. State of Arkansas,* 87 S. Ct. 1414, 386 U.S. ...., 18 L. Ed. 515; *Kenney v. State of New York,* 87 S. Ct. 2091, .... U.S. ....; *Friedman v. New York,* 87 S. Ct. 2091, *Ratner v. California,* 87 S. Ct. 2092; *Cobert v. New York,* 87 S. Ct. 2092; *Sheperd v. New York,* 87 S. Ct. 2093; *Avansino v. New York,* 87 S. Ct. 2093; *Aday v. United States,* 87 S. Ct. 2095; *Rosenbloom v. Virginia,* 87 S. Ct. 2095; *Corinth Publications, Inc. v. Westberry,* 87 S. Ct. 2096; *Books, Inc. v. United States,* 87 S. Ct. 2098; *A Quantity of Copies of Books v. Kansas,* 87 S. Ct. 2104; *Mazes v. Ohio,* 87 S. Ct. 2105; *Schackman v. California,* 87 S. Ct. 2107; *Landau v. Fording,* 87 S. Ct. 2109.

Petitioner most respectfully contends that these paramount and precious rights so derived should never be left with a local court their final arbiter. These First Amendment rights demand a constitutional judgment of the most sensitive type which must, when required, always be finally adjudicated by the United States Supreme Court.

## II.

## Certiorari Should Be Granted Because the Highest Court of the State of California in Which a Decision Could Be Had in the Instant Matter Has Decided a Substantial Federal Question (First Amendment, United States Constitution) Not in Accord With Applicable Decisions of This Court.

Petitioner contends that independent review by this honorable court is required because the materials involved herein, when tested by a proper application of constitutional standards and compared with the subject matter of the following cited cases, is clearly not obscene.

*Times Film Corp. v. Chicago,* 355 U.S. 35, 78 S. Ct. 115;

*One, Inc. v. Olesen,* 355 U.S. 371, 78 S. Ct. 364;

*Sunshine Book Co. v. Summerfield,* 355 U.S. 372, 78 S. Ct. 365;

*Kingsley International Pictures Corp. v. Regents,* 360 U.S. 685;

*Manual Enterprises, Inc. v. Day,* 370 U.S. 478;

*Jacobellis v. Ohio, supra;*

*Zeitlin v. Arnebergh,* 59 Cal. 2d 901;

*Redrup v. State of New York,* 87 S. Ct. 1414, 386 U.S. ...., 18 L. Ed. 515;

*Austin v. State of Kentucky*, 87 S. Ct. 1414, 386 U.S. ...., 18 L. Ed. 515;

*Gent v. Arkansas*, 87 S. Ct. 1414, 386 U.S. ...., 18 L. Ed. 515;

*Kenney v. State of New York*, 87 S. Ct., 2091 ....U.S.....;

*Friedman v. New York*, 87 S. Ct. 2091;

*Ratner v. California*, 87 S. Ct. 2092;

*Cobert v. New York*, 87 S. Ct. 2092;

*Sheperd v. New York*, 87 S. Ct. 2093;

*Avansino v. New York*, 87 S. Ct. 2093;

*Aday v. United States*, 87 S. Ct. 2095;

*Rosenbloom v. Virginia*, 87 S. Ct. 2095;

*Corinth Publications, Inc. v. Westberry*, 87 S. Ct. 2096;

*Books, Inc. v. United States*, 87 S. Ct. 2098;

*A Quantity of Copies of Books v. Kansas*, 87 S. Ct. 2104;

*Mazes v. Ohio*, 87 S. Ct. 2105;

*Schackman v. California*, 87 S. Ct. 2107;

*Landau v. Fording*, 87 S. Ct. 2109.

Petitioner respectfully points out that the materials here involved are precisely similar to the materials in *Friedman v. New York, supra.*

In spite of the above, the materials here involved have been suppressed by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. Petitioner has been convicted and sentenced to jail for disseminating and advertising material which clearly cannot constitutionally be proscribed.

## Conclusion.

The petition for a writ of certiorari should be granted and the decision reversed.

Respectfully submitted,

NORMAN R. ATKINS,
BURTON C. JACOBSON,
RICHARD A. LAVINE,
*Attorneys for Petitioner.*

## APPENDIX A.

### Order Denying Rehearing and Granting Certification.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Samuel Ratner, Defendant and Appellant.

Superior Court No. CR A 7261. Trial Court No. M35295.

The petition of appellant for a rehearing after judgment of this court on appeal and petition for certification of cause to the Court of Appeal, in the above-entitled case, having been filed and having been duly considered,

The petition for rehearing is hereby denied;

The petition for certification of cause to the Court of Appeal is hereby granted.

Dated July 6, 1967.

BY THE COURT,
Aiso
Presiding Judge
MEYER
Judge
WHYTE
Judge

**Order Certifying Cause to Court of Appeal.**

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Samuel Ratner, Defendant and Appellant.

Superior Court No. CR A 7261. Trial Court No. N35295.

Pursuant to the applicable provisions of Rule 63, California Rules of Court, and appellant's (defendant's) timely application, we certify that the transfer of the above-entitled case to the Court of Appeal appears necessary to settle important questions of law and to secure uniformity of decision. The questions are:

1. Are the booklet "Bondage Cabin" (subject matter of Count I) and the film "The Count (subject matter of Count II) constitutionally protected under the 1st and 14th Amendments to the United States Constitution, or are the matters or either of them obscene?

2. Under Count III (violation of Penal Code §311.5) must the materials advertised themselves be obscene?

By this court's judgment entered June 8, 1967, affirming without opinion the judgment of conviction on all three counts charged, we held the matters in both Counts I and II to be obscene, the proof in our opinion fully meeting the requirements of *Mishkin v. New York* (1966) 383 U.S. 502; *Ginzburg v. United States*

(1966) 383 U.S. 463; and *United States v. Klaw* (2d Cir., 1965) 350 F.2d 155; and on Count III that the materials advertised need not in fact be obscene as long as they are represented or held out to be obscene, following this court's holding in *People v. Tierney* (1967) CR.A. 6922.

Dated July 6, 1967.

BY THE COURT.

AISO
Presiding Judge

MEYER
Judge

WHYTE
Judge

## APPENDIX B.

Appellate Department

Superior Court, Los Angeles County, California

No. CR A 7261

People vs. Ratner.

Judgment in the above entitled appeal is affirmed. Judgment filed.

Dated June 8, 1967.

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles

By J. MacGregor—Deputy

## APPENDIX C.

### On Appeal—Criminal.

Superior Court of the State of California, for the County of Los Angeles, Appellate Department.

People of the State of California, Plaintiff and Respondent, vs. Samuel Ratner, Defendant and Appellant. No. CR A 7261.

1. Petition for Rehearing.

2. Application for Certification to the District Court of Appeals.

3. Points and Authorities in Support of Petition for Rehearing and Application for Certification to the District Court of Appeals.

4. Declaration of Burton C. Jacobson in Support of Petition for Rehearing and Application for Certification to the District Court of Appeals.

### PETITION FOR REHEARING

To the Honorable Judges of the Appellate Department in the Superior Court of the State of California, For the County of Los Angeles:

Defendant and appellant, SAM RATNER, presents his petition for a rehearing of the above cause, and in support thereof, respectfully shows:

1. The appeal in the cause was argued before this court on May 25, 1967.

2. On June 8, 1967, this court rendered its decision in favor of the plaintiff and respondent and against the defendant and appellant, confirming the judgment of the Municipal Court, El Monte Judicial District, County of Los Angeles, State of California.

3. The defendant and appellant seek a rehearing upon the following grounds:

a. This court erred by applying an incorrect test of obscenity.

b. This court erred in finding the material herein to be obscene and to be hard core pornography.

c. This court erred in finding a corpus delecti had been established.

d. This court erred in finding that no prejudicial error had occurred in the questioning of Dr. Crahan by the prosecution.

For the foregoing reasons, it is urged that this petition be granted.

Dated: June 14, 1967.

Respectfully submitted,

ATKINS & JACOBSON
By Burton C. Jacobson
Attorneys for Defendant and
Appellant.

## APPLICATION FOR CERTIFICATION TO THE DISTRICT COURT OF APPEALS

To the Honorable Judges of the Appellate Department of the Superior Court of the State of California, County of Los Angeles:

Defendant and appellant, SAM RATNER, presents this application for certification to the District Court of Appeals of the above cause upon the following grounds:

a) The transfer of the instant case is necessary to secure uniformity of decision in that this Court's affirming decision filed June 8, 1967 is contrary to the law of the State of California as expressed in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901; is contrary to the test of obscenity as contained in the Penal Code of the State of California, §311 (a); and is contrary to the law of the United States of America as expressed in *Roth v. United States,* 354 U.S. 476; *One, Inc v. Olesen,* 355 U.S. 371; *Times Film Corp. v. Chicago,* 355 U.S. 35; *Sunshine Book Co. v. Summerfield,* 355 U.S. 372; *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478; *Jacobellis v. Ohio,* 84 S. Ct. 1676; *Tralins v. Gerstein,* 84 S. Ct. 1903; *Grove Press v. Gerstein,* 84 S.Ct. 190; *Winters v. New York,* 68 S.Ct. 665, and *Burstyn, Inc. v. Wilson,* 72 S. Ct. 777.

b) To settle important questions of law involving the constitutional guarantees of freedom of speech and expression as contained in the United States Constitu-

tion, First and Fourteenth Amendments and the California Constitution, Article One §9.

(1) Under the rule of law laid down in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, that only "hard core pornography" is proscribed, what material is embraced within the term "hard core pornography"?

(2) Does the material involved herein fall within the definition of the phrase "hard core pornography"?

(3) What is the proper method of application of the definition of obscenity as contained in §311 (a) of the Penal Code of the State of California?

For the foregoing reasons, it is urged that this application be granted.

Dated: June 14, 1967.

Respectfully submitted,

ATKINS & JACOBSON

By Burton C. Jacobson

Attorneys for Defendant and Appellant.

## POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING AND IN SUPPORT OF APPLICATION FOR CERTIFICATION TO DISTRICT COURT OF APPEALS.

### I.

### THIS COURT ERRED IN AFFIRMING APPELLANT'S CONVICTION IN THE INSTANT CASE.

Before any material may be legally proscribed or suppressed *all* of the various elements contained in the definition of obscenity must coalesce and be met. These elements are as follows:

1) The material must be tested by "the average person".

2) The average person must test the material by applying "contemporary standards".

3) The material must be tested by its "predominant appeal".

4) The predominant appeal of the material must be "taken as a whole" and not part by part.

5) The said predominant appeal of the material taken as a whole must be to "prurient interest" as defined in §311 (a) of the Penal Code of the State of California.

6) The description or representation of such matter must go "substantially beyond customary limits of candor".

7) Last but not least, the matter must also be *utterly* without redeeming social importance.

If the material under consideration does not meet *all* of these elements then that materia may not be declared obscene and proscribed.

*Roth v. United States,* 354 U.S. 476; *Manual Enterprises, Inc v. Day,* 82 S. Ct. 1432, pp. 1436-1437.

II.

THE BOOK ENTITLED "BONDAGE CABIN" (COUNT ONE), AND THE MOTION PICTURE FILM ENTITLED "THE COUNT" (COUNT TWO), ARE NOT OBSCENE AS A MATTER OF LAW, BUT RATHER ARE CONSTITUTIONALLY PROTECTED MATERIALS.

*Penal Code* §*311.2* proscribes only obscene matter. If the underlying matter is not obscene, then no matter what else it might be, no crime has been committed and the material is then protected by the First Amendment to the Constitution of the United States and Article I, §9 of the Constitution of the State of California.

The California Supreme Court in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, held, basing its decision on *Roth v. United States,* 354 U.S. 476, and cases following it, that only that which is designated as "hard-core pornography" falls outside of the constitutional protection.

In *Zeitlin,* the court made this pronouncement twice:

> "This decision and others of the United States Supreme Court, we think, impliedly draw a line of constitutional protection around all material except that which has been described as hard-core pornography." (pp. 911-912)

and again:

> "By employing the term 'utterly' the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was *totally* devoid of social importance. The only material that falls into the latter category is hard-core pornography." (p. 920)

What then, is obscenity? The modern day definition had its genesis in *Roth*. In wrestling with the problem of what is obscenity the Solicitor-General of the United States equated it with hard-core pornography and described it as follows: (Brief for the United States, pp. 37-38, *United States v. Roth*, 354 U.S. 476 [1957]):

> "This is commercially produced material in obvious violation of present law. . . . This material is manufactured clandestinely in this country or abroad and smuggled in. There is no desire to portray the material in pseudoscientific or 'arty' terms. The production is plainly 'hard-core' pornography, of the most explicit variety, devoid of any disguises.
>
> "Some of this pornography consists of erotic objects. There are also large number of black and white photographs, individually, in sets and in booklet form, of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts. There are small printed pamphlets or books, illustrated with such photographs, which consist of stories in simple, explicit words of sexual excesses of every kind, over and over again. No one would suggest that they had the slightest literary merit or were intended to have

any. There are also large numbers of 'comic books', especially drawn for the pornographic trade, which are likewise devoted to explicity illustrated incidents of sexual activity, normal or perverted. . . . It may be said that most, if not all, of this type of booklet contain drawings not only of normal fornication but also of perversions of various kinds.

"The worst of the 'hard-core' pornographic materials now being circulated are the motion picture films. These films, sometimes of high technical quality, sometimes in color, show people of both sexes engaged in orgies which again include every form of sexual activity known, all of which are presented in a favorable light. The impact of these pictures on the viewer cannot easily be imagined. No form of incitement to action or to excitation could be more explicit or more effective."

Thus, we may assume that the Supreme Court of the United States in *Roth* impliedly adopted the description given obscenity by the Solicitor General himself. The test of obscenity, therefore, as contained in *Roth* was confirmed by every single decision involving obscenity from that date to the present time.

It is strongly urged that if the material which is the subject matter of the instant case is compared with the description of and requisite elements of the test of obscenity enunciated in Roth, Zeitlin, and all subsequent cases, it becomes manifest that the instant material is not obscene, as a matter of law. If the material is not obscene, then appellant has committed no violation of §311.2 of the Penal Coe of which he stands

charged. If the material herein involved is not obscene as a matter of law, no jury or any body or court could have reasonable or probable cause, or any cause, to believe it to be obscene. The findings of obscenity are, as Mr. Justice Tobriner tells us in *Zeitlin* (p. 910) "a constitutional fact."

It is most important to note that in every matter coming before the United States Supreme Court since its decision in *Roth,* wherein the United States Supreme Court has granted certiorari or noted jurisdiction, the finding or judgment of obscenity has been reversed or upset; with the exception only of *Ginzburg v. United States,* 86 S. Ct. 942, and *Mishkin v. State of New York,* 86 S. Ct. 958, involving issues not herein involved. A list of the cases in which the Supreme Court has reversed obscenity findings are as follows:

*One, Inc. v. Olesen,* 355 U.S. 371;

*Times Film Corp. v. Chicago,* 365 U.S. 43;

*Sunshine Book Co. v. Summerfield,* 355 U.S. 372;

*Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684;

*Manuel Enterprises, Inc. v. Day,* 370 U.S. 478;

*Jacobellis v. Ohio,* 84 S. Ct. 1676;

*Tralines v. Gerstein,* 84 S. Ct. 1676;

*Grove Press v. Gerstein,* 84 S. Ct. 190; and

*A Book, etc., v. Attorney General of the Commonwealth of Massachusetts* (Fanny Hill case) 86 S. Ct. 975.

The clear purport of all decisions of the United States Supreme Court since *Roth* indicates that the

court clearly meant what it said in *Roth* about "keeping the door tightly closed and opened only the slightest crack." (*Roth v. United States,* 354 U.S. 476, at 488).

In addition to the foregoing authorities, an opinion by the Superior Court of the State of California for the County of Los Angeles, in *People v. Zentner,* et al (Nov. 4, 1966), written by Judge Kenneth Holland, is most illuminating and, the appellant submits, dispositive as to what constitutes illegal pornography under §311.2.

## III.

## THE ADVERTISING MATERIAL WHICH IS THE SUBJECT MATTER OF COUNT THREE CANNOT AS A MATTER OF LAW VIOLATE SECTION 311.5 OF THE PENAL CODE.

§311.5 says:

> "Advertising or promoting sale or distribution; solicitation.
>
> "Every person who writes or creates advertising or solicits anyone to publish such advertising or otherwise promotes the sale or distribution of matter represented or held out by him to be obscene, is guilty of a misdemeanor."

The plain meaning of the statute is that in order to constitute a violation thereof, the advertising material involved must clearly and explicitly offer obscene material. If the advertising brochure does not offer obscene material, no violation of §311.5 can occur. The material advertised is in no way connected with a viola-

tion of §311.5. It is only the advertising material itself which can constitute a violation of the statute. In other words, and to simply state the proposition, the appellant must advertise material which he represents to be obscene; and in order to do that, he must represent that his material is obscene as defined in §311(a) of the Penal Code.

§311(a) defines obscenity as follows:

> "'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

We must note that the Supreme Court of the State of California in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, interpreted the above definition of obscenity as being equal to or the same as "hard-core pornography" (*Zeitlin,* p. 920)

It is respectfully submitted that the advertising brochure herein involved is not capable of being found to represent that it offers for sale material which is obscene under the law of this State, as enunciated in *Zeitlin.*

It is therefore respectfully submitted that the advertising material herein involved does not and cannot vio-

late §311.5 of the Penal Code of the State of California as a matter of law.

The latest case which interprets §311.5 and enunciates how it should be applied is the case decided by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles on Setpember 20, 1966, in *People v. Amslow,* etc. CR A 6960. Since that decision was rendered, the Appellate Department certified the issues involved to the District Court of Appeals for opinion by them. The District Court of Appeals refused to accept the certification and said opinion thereby becomes the law binding upon the court.

A plain reading of that decision makes crystal clear that the correct legal interpretation of P.C. §311.5 requires that to sustain a conviction, the defendant must through the advertising brochure "solicit other persons *to promote* the sale or distribution of the material advertised, and that such solicitation must not only solicit others to promote the sale and distribution of the material, but must also require that the recipient who promotes the sale of the material represents it (the material) as obscene."

It is obvious, therefore, that the advertising brochure involved in the instant case does not solicit the recipient of the brochure to promote the material advertised, and obviously it does not either solicit the recipient to not only promote the sale or distribution of the material, but also at the same time hold the material out as being obscene. This alone is sufficient reason for finding that advertising material herein cannot be within the purview of §311.5 as a matter of law.

## IV

## THE QUESTIONS OF LAW INVOLVED IN THE INSTANT CASE ARE OF GREAT IMPORTANCE AND INVOLVE THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION AND SPEECH AS CONTAINED IN AMENDMENTS ONE AND FOURTEEN OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE §1 OF THE CALIFORNIA STATE CONSTITUTION.

No authority is needed for the basic proposition that constitutionally guaranteed freedoms are matters of utmost importance.

Since the decision by the United States Supreme Court in *Roth* in 1957, the courts of this country and of this state have wrestled with the problem of what material fell within the definition of obscenity as outlined in *Roth*. Cases came up holding that nudity per se were not obscenity. Cases came up holding that sex per se was not obscenity. Finally, in our own state, in the *Zeitlin* decision, the Supreme Court of California identified obscene material as being only that which is "hard core pornography". This now leaves us to wrestle with what is hard core pornography. What exact material is proscribed as being obscene and not entitled to the protection of the First and Fourteenth Amendments of the Constitution of the United States and Article One §9 of the California State Constitution?

## V

## THERE WAS ABSOLUTELY NO EVIDENCE FROM WHICH THE JURY COULD FIND THE REQUISITE ELEMENTS OF THE TEST OF OBSCENITY AS ENUNCIATED IN §311 (a) OF THE PENAL CODE; I.E., NO CORPUS DELICTI WAS ESTABLISHED.

§311 (a) of the Penal Code reads as follows:

> "'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters, and is matter which is utterly without redeeming social importance."

Breaking this definition down into its essential elements, we can see that it is multipartite in composition, which the elements breaking down as follows:

1. To the average person
2. Applying contemporary standards
3. The predominant appeal of the matter, taken as a whole,
4. Is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion
5. Which goes substantially beyond customary limits of candor in description or representation of such matters.
6. And is matter which is utterly without redeeming social importance.

There is no question that all of the above elements of obscenity must be proven beyond a reasonable doubt by the prosecution, and that there must be a coalescence of each and every one of these elements in order for a tryer of fact to be able to make a finding of obscenity. *Landau v. Fording,* 245 ACA 872; *U.S. v. Klaw,* 350 Fed 2d, 155.

The requirement of proof is more sensitive and more particularly required when the alleged obscenity has to do with deviant groups. (Klaw, p. 166, "and if proof of prurient stimulation and response is generally important, it is particularly important and necessary when the prurient interest may be that of a deviant segment of society, whose reactions are hardly a matter of common knowledge.") There is no rule of res ipsa loquitur in the field of obscenity where first amendment privileges are involved. Where such is done, the only conclusion that can be reached is that the jurors would be left to speculate, and this the First Amendment to the United States Constitution would not countenance. As was stated by the *Klaw* Court at p. 167:

> "Whatever the value of mere 'autoptical' evidence in other contexts, it should not readily be countenanced in this area. Otherwise, too easily the government's test might allow a jury to equate patent offensiveness to prurient appeal, thus obliterating the conjunction that has been thought indispensable."

Here again, the Court makes reference to the fact that prurient appeal alone is not sufficient. In other words, the *Klaw* court states at p. 164:

> "In addition to its appeal to 'prurient interest', proscribable 'obscenity' must be 'utterly without redeeming social importance'.—It must go 'substantially' beyond the customary limits of candor in description or representation'—It must be characterized by 'patent offensiveness'.—In brief, it is 'hard-core pornography'—"

The Klaw Court again reiterates the necessity for the conjunction of several elements at p. 164, where they say:

> "Thus, material is proscribable 'obscenity' or hard-core pornography, if it has the requisite prurient appeal, *and* if it so exceeds customary candor as to be patently offensive, *unless* it has *any* redeeming social importance." They go on to say: "However, the absence of artistic or literary value or other value of social consequence does not, without more, lead to a finding of proscribable 'obscenity'. Such qualities would merely insulate what otherwise might be proscribable due to its offensiveness and prurient appeal."

Summing up, each element must come together at one time and be proved by the prosecution, by evidence, in order for a finding of obscenity to be had of any given piece of material. A search of the record in the instant case will show an utter lack of such evidence. As a matter of fact, the only evidence offered by the People was the testimony of Dr. Marcus Crahan, and

his evidence related only to whether or not there was an appeal to the prurient interest of a deviant group. No other evidence as to any of the other requisite elements was offered by the People.

Therefore, appellant respectfully submits that no corpus delecti was established at any time.

Dated: June 14, 1967.

Respectfully submitted,

/s/ By Burton C. Jacobson
Burton C. Jacobson
Attorneys for Defendant
and Appellant.

## DECLARATION OF BURTON C. JACOBSON IN SUPPORT OF PETITION FOR REHEARING AND APPLICATION FOR CERTIFICATION TO THE DISTRICT COURT OF APPEALS

Burton C. Jacobson declares that he is an attorney-at-law licensed to practice before all courts of the State of California, and that he is one of the attorneys for defendant and appellant, SAMUEL RATNER.

He hereby certifies that the foregoing petition for rehearing and application for certification to the District Court of Appeals is submitted in good faith and not for purposes of delay.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 14, 1967.

/s/ By Burton C. Jacobson

## APPENDIX D.

### Rule 63. Certification.

*(a)* [*Authority to make*] The superior court on application of a party or on its own motion may certify that the transfer of a case to the District Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. Such certification may be made by a majority of the judges of the appellate department, or, in a county having no appellate department, by the judge hearing the appeal. When there was a trial in the superior court, the judge who tried the case may make such certification. If any judge of the appellate department who participated in the decision is unable to act on the certification, then a judge designated or assigned to the appellate department by the chairman of the Judicial Council may act in his place. If the judge who heard the appeal or tried the case is unable to act, then the certification may be made by a judge designated by the presiding judge or, if there be no presiding judge, by any judge of the court.

## APPENDIX E.

In the Court of Appeal of the State of California, Second Appellate District, Division .....

People of the State of California, Plaintiff and Respondent, v. Samuel Ratner, Defendant and Appellant. 2d Cr. No. 13813. Superior Court No. CR A 7261 Trial Court No. M35295.

Filed: July 26, 1967.

THE COURT:

The record on transfer in the above entitled cause having been filed in this Court on July 10, 1967, pursuant to certification made by the Appellate Department of the Superior Court of Los Angeles County, and this Court having considered the matter of whether such cause should be transferred to this Court for hearing and decision, now, therefore, it is hereby ordered that such transfer be and it hereby is denied.

## APPENDIX F.

### Defendant's Designation of Record on Appeal, and Statement on Appeal.

In the Municipal Court of El Monte Judicial District, County of Los Angeles, State of California.

The People of the State of California, Plaintiff, vs. Samuel Ratner, Defendant. No. M 35395.

COMES NOW the defendant, SAMUEL RATNER, and, pursuant to Rules 183 and 184 of the California Judicial Council Rules on Appeal from Municipal Courts in Criminal Cases, hereby designates the record and files his statement on appeal.

*Designation of Record on Appeal:*

1. The Amended Complaint
2. Demurrer to the Complaint and Order of the Court thereon.
3. The Clerk's Transcript
4. The Reporter's Transcript
5. All written instructions given
6. All written instructions requested, refused or modified
7. All minutes of the Court relating to the action
8. The Jury Verdict
9. The Motion In Arrest of Judgment or in the alternative, the Motion for a New Trial including Points and Authorites
10. All exhibits, instructions, orders, papers and documents refered to or identified in such papers or transcripts as provided in Rule 184
11. The Judgment of the Court
12. The Notice of Appeal filed November 29, 1966
13. This Statement on Appeal

*Statement on Appeal*

The grounds upon which defendant relies:

I.

The book entitled "Bondage Cabin" upon which defendant was convicted in Count One of the amended complaint is not obscene as a matter of law, but rather is constitutionally protected material.

II.

The motion picture film "The Count" upon which defendant was convicted in Count Two of the amended complaint is not obscene as a matter of law, but rather is constitutionally protected material.

III.

The advertising material which is the subject matter of Count Three cannot as a matter of law violate Section 311.5 of the Penal Code.

IV.

The Court erred in failing to dismiss the action on the grounds that the material was constitutionally protected as a matter of law.

V.

The Court erred by giving improper instructions to the Jury particularly with regard to the California rule of law as enunciated in *Zeitlin v. Arnebergh,* 59 Cal. 2d 902, to wit: that only that which constitutes "hard-core pornography" may constitutionally be prohibited in California as being obscene; and in giving erroneous instructions concerning the Supreme Court's interpretation of the law of the State of New York in the "Mishkin" decision (*Mishkin v. State of New York,* 86 Sup Ct. 958).

VI.

There was no evidence from which the Jury could find the requisite elements of the test of obscenity as enunciated in 311 (a) of the Penal Code.

VII.

There was no evidence from which the Jury could find that a violation of Section 311.5 of the Penal Code had been made by the material involved in Count Three of the amended complaint.

VIII.

The Court erred in denying defendant's Motion in Arrest of Judgment and denying defendant's Motion for a New Trial.

IX.

No corpus delecti was established at any time during the trial as to any of the counts of the amended complaint.

X.

There was no evidence from which the jury could find that the defendant had knowledge that the material was obscene as required by Section 311 (e) of the Penal Code, or that the required element of scienter was established by any evidence at all.

XI.

That Sections 311.2 and 311.5 of the Penal Code are unconstitutional as being vague and indefinite, and being incapable of giving the required notice as to what constitutes a violation either to the general public, and more particularly, the defendant.

Dated:

ATKINS & JACOBSON

BY.....

Burton C. Jacobson

Attorneys for Defendant

## APPENDIX G.

### Appellant's Opening Brief.

Superior Court of the State of California, for the County of Los Angeles, Appellate Department.

People of the State of California, Plaintiff and Respondent, vs. Samuel Ratner, Defendant and Appellant. No. CR A 7261.

### STATEMENT OF THE CASE

This is the case in which there was a three count amended complaint charging the respondent on the first two counts with violating §311.2 of the Penal Code, to wit, distribution of obscene matter, and charging the respondent with violating §311.5 of the Penal Code, to wit, advertising to promote obscenity.

After a lengthy jury trial in the Municipal Court of El Monte Judicial District, the Honorable John K. Otis, Judge presiding, the defendant was convicted of the three counts contained in said amended complaint. The defendant did timely file his notice of appeal and did designate his record and make a statement on appeal, heretofore filed.

### I.

### THE BOOK ENTITLED "BONDAGE CABIN" (COUNT ONE), AND THE MOTION PICTURE FILM ENTITLED "THE COUNT" "COUNT TWO), ARE NOT OBSCENE AS A MATTER OF LAW, BUT RATHER ARE CONSTITUTIONALLY PROTECTED MATERIALS.

*Penal Code §311.2* proscribes only obscene matter. If the underlying matter is not obscene, then no matter what else it might be, no crime has been committed

and the material is then protected by the First Amendment to the Constitution of the United States and Article I, §9 of the Constitution of the State of California.

The California Supreme Court in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, held, basing its decision on *Roth v. United States,* 354 U.S. 476, and cases following it, that only which is designated as "hard-core pornography" falls outside of the constitutional protection. In *Zeitlin,* the court made this pronouncement twice:

> "This decision and others of the United States Supreme Court, we think, impliedly draw a line of constitutional protection around all material except that which has been described as hard-core pornography." (pp. 911-912)

and again:

> "By employing the term 'utterly' the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was *totally* devoid of social importance. The only material that falls into the latter category is hard-core pornography." (p. 920)

What then, is obscenity? The modern day definition had its genesis in *Roth.* In wrestling with the problem of what is obscenity the Solicitor-General of the United States equated it with hard-core pornography and described it as follows: (Brief for the United States, pp. 37-38, *United States v. Roth,* 354 U.S. 476 [1957]):

> "This is commercially produced material in obvious violation of present law. . . . This material is manufactured clandestinely in this country or abroad and smuggled in. There is no desire to

portray the material in pseudo-scientific or 'arty' terms. The production is plainly 'hard-core' pornography, of the most explicit variety, devoid of any disguises.

"Some of this pornography consists of erotic objects. There are also large number of black and white photographs, individually, in sets, and in booklet form, of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts. There are small printed pamphlets of books, illustrated with such photographs, which consist of stories in simple, explicit words of sexual excesses of every kind, over and over again. No one would suggest that they had the slightest literary merit or were intended to have any. There are also large numbers of 'comic books', specially drawn for the pornographic trade, which are likewise devoted to explicitly illustrated incidents of sexual activity, normal or perverted. . . . It may be said that most, if not all, of this type of booklets contain drawings not only of normal fornication but also of perversions of various kinds.

"The worst of the 'hard-core' pornographic materials now being circulated are the motion picture films. These films, sometimes of high technical quality, sometimes in color, show people of both sexes engaged in orgies which again include every form of sexual activity known, all of which are presented in a favorable light. The impact of these pictures on the viewer cannot easily be imagined. No form of incitement to action or to excitation could be more explicit or more effective."

Thus, we may assume that the Supreme Court of the United States in *Roth* impliedly adopted the description given obscenity by the Solicitor General himself. The test of obscenity, therefore, as contained in *Roth* was confirmed by every single decision involving obscenity from that date to the present time.

It is strongly urged that if the material which is the subject matter of the instant case is compared with the description of and requisite elements of the test of obscenity enunciated in Roth, Zeitlin, and all subsequent cases, it becomes manifest that the instant material is not obscene, as a matter of law. If the material is not obscene, then defendant has committed no violation of §311.2 of the Penal Code of which he stands charged. If the material herein involved is not obscene as a matter of law, no jury or any body or court could have reasonable or probable cause, or any cause, to believe it to be obscene. The findings of obscenity are, as Mr. Justice Tobriner tells us in *Zeitlin* (p. 910) "a constitutional fact."

It is most important to note that in every matter coming before the United States Supreme Court since its decision in *Roth,* wherein the United States Supreme Court has granted certiorari or noted jurisdiction, the finding or judgment of obscenity has been reversed or upset; with the exception only of *Ginzburg v. United States,* 86 S. Ct. 942, and *Mishkin v. State of New York,* 86 S. Ct. 958, involving issues not herein

involved. A list of the cases in which the Supreme Court has reversed obscenity findings are as follows:

*One, Inc. v. Olesen,* 355 U.S. 371;
*Times Film Corp. v. Chicago,* 365 U.S. 43;
*Sunshine Book Co. v. Summerfield,* 355 U.S. 372;
*Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684;
*Manuel Enterprises, Inc. v. Day,* 370 U.S. 478;
*Jacobellis v. Ohio,* 84 S. Ct. 1676;
*Tralins v. Gerstein,* 84 S. Ct. 1903;
*Grove Press v. Gerstein,* 84 S. Ct. 190; and
*A Book, etc v. Attorney General of the Commonwealth of Massachusetts* (Fanny Hill case) 86 S. Ct. 975.

The clear purport of all decisions of the United States Supreme Court since *Roth* indicates that the court clearly meant what it said in *Roth* about "keeping the door tightly closed and opened only the slightest crack." (*Roth v. United States,* 354 U.S. 476, at 488).

In addition to the foregoing authorities, an opinion by the Superior Court of the State of California for the County of Los Angeles, in *People v. Zentner, et al.* (Nov. 4, 1966), written by Judge Kenneth Holland, is most illuminating and, the defendant submits, dispositive as to what constitutes illegal pornography under §311.2. A copy of said memorandum opinion is attached hereto as APPENDIX A to this brief.

## II

## THE ADVERTISING MATERIAL WHICH IS THE SUBJECT MATTER OF COUNT THREE CANNOT AS A MATTER OF LAW VIOLATE SECTION 311.5 OF THE PENAL CODE.

§311.5 says:

> "Advertising or promoting sale or distribution; solicitation.
>
> "Every person who writes or creates advertising or solicits anyone to publish such advertising or otherwise promote the sale or distribution of matter represented or held out by him to be obscene, is guilty of a misdemeanor."

The plain meaning of the statute is that in order to constitute a violation thereof, the advertising material involved must clearly and explicitly offer obscene material. If the advertising brochure does not offer obsene material, no violation of §311.5 can occur. The material advertised is in no way connected with a violation of §311.5. It is only the advertising material itself which can constitute a violation of the statute. In other words, and to simply state the proposition, the defendant must advertise material which he represents to be obscene; and in order to do that, he must represent that his material is obscene as defined in §311(a) of the Penal Code.

§311(a) defines obscenity as follows:

> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes

substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

We must note that the Supreme Court of the State of California in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, interpreted the above definition of obscenity as being equal to or the same as "hard-core pornography" (*Zeitlin,* p. 920).

It is respectfully submitted that the advertising brochure herein involved is not capable of being found to represent that it offers for sale material which is obscene under the law of this State, as enunciated in *Zeitlin.*

It is therefore respectfully submitted that the advertising material herein involved does not and cannot violate §311.5 of the Penal Code of the State of California as a matter of law.

The latest case which interprets §311.5 and enunciates how it should be applied is the case decided by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles on September 20, 1966, in *People v. Amslow, etc.* CRA 6960. A copy of said opinion is attached hereto as APPENDIX B.

Since that decision was rendered, the Appellate Department certified the issues involved to the District Court of Appeals for opinion by them. The District Court of Appeals refused to accept the certification and said opinion thereby becomes the law binding upon the court.

A plain reading of that decision makes crystal clear that the correct legal interpretation of P.C. §311.5 re-

quires that to sustain a conviction, the defendant must through the advertising brochure "solicit other persons *to promote* the sale or distribution of the material advertised, and that such solicitation must not only solicit others to promote the sale and distribution of the material, but must also require that the recipient who promotes the sale of the material represents it (the material) as obscene."

It is obvious, therefore, that the advertising brochure involved in the instant case does not solicit the recipient of the brochure to promote the material advertised, and obviously it does not either solicit the recipient to not only promote the sale or distribution of the material, but also at the same time hold the material out as being obscene. This alone is sufficient reason for finding that advertising material herein cannot be within the purview of §311.5 as a matter of law.

III

THE TRIAL COURT ERRED BY GIVING IMPROPER INSTRUCTIONS TO THE JURY.

A. The Court refused to give the rule of law enunciated in *Zeitlin v. Arnebergh,* 59 Cal. 2d 902, to wit: that only that which constitutes "hard-core pornography" may constitutionally be prohibited in California as being obscene. There can be no question since the decision of the United States Supreme Court in *Mishkin v. New York,* 86 S Ct. 958, that a State is free to adopt a narrower interpretation of the term obscene than was adopted by the United States Supreme Court in *Roth v. United States,* 354 U.S. 476. Certainly, therefore, our Supreme Court in the *Zeitlin* case did adopt a more severe standard when they adopt-

ed the "hard-core pornography" test. Since defendant feel this is a point of utmost importance, he was nonetheless forbidden from arguing the same by reason of the Court's refusal to give a Zeitlin "hard-core pornography" instruction. There can be no doubt that this was highly prejudicial and detrimental to the effective defense of the defendant, particularly at the time of argument when no "hard-core pornography" instruction was to be given. Therefore, appellant submits that it was error for the Court to refuse instructions numbers 35 and 36 at the time of trial.

B. 1. The Court erred in giving any "Mishkin" type of instruction. It is the defendant's position that the rules and law enunciated in *Mishkin v. New York,* 86 S Ct 958, are inapplicable in a prosecution in the State of California. The Supreme Court in the *Mishkin* case interpreted §1141 of the Penal Code of the State of New York, which specifically concerns sadistic and masochistic material. The Supreme Court of the United States held that such delineations were not impermissibly vague when the Courts of the State of New York in their decisions held such terms to be synonomous with obscene. (Mishkin, 86 S Ct, at p. 62). It is most important to note that there have been no decisions in the State of California making the definition of obscenity as it is contained in §311(a) of the Penal Code of this State applicable or synonymous with "sadistic" and/or "masochistic". §311(a) of the Penal Code in no way, shape or form intends to, aims at or attempts to include sadistic or masochistic material, requiring an interpretation that this is synonomous with obscenity in order to meet constitutional safeguards. It is not the function or duty of the

Courts to give strained meaning to the obvious legislative intent of this State in the passage of §311(a) of the Penal Code, which specifically states as a test of obscenity only that material which would appeal to the prurient interest of an average person. If the legislature of the State of California intended to cover sadistic or masochistic material, certainly they would have said so in plain and no uncertain terms as did the legislature of the State of New York. Their silence in that regard can only be construed to mean that they did not intend that such types of material be covered within the proscribes of the California obscenity statute.

B. 2. Assuming, arguendo, that the *Mishkin* rule applies to the State of California, the Court improperly instructed as to the Mishkin rule when it modified defendant's proposed instruction number 31, and thereby eliminated the words "containing an average member". Since our Penal Code in §311(a) requires a prurient appeal test to the average person, even if we adjust the average person requirement to an average well-defined deviant group, the use of the word average and its importance to the definition of §311(a) cannot be lightly overlooked. Again, appellant feels that his argument and case in chief was substantially prejudiced by being unable to argue the lack of proof by the People that there was an average member of any deviant group to which this material had a prurient appeal.

Additionally, the People's instructions numbers 2, 3 and 4, containing certain definitions of sadism, mashochism and flagellation, were given over defendant's objections. There is absolutely no authority in any case that appellant has been able to find in which it was

held proper to give any instruction such as 2, 3 and 4. Appellant contends that the definitions given in said instructions were slanted definitions, aimed at creating bias and prejudice in the minds of the jury since said definitions only gave the sexual connotations to these terms, rather than an unbiased approach to defining the terms involved. It goes without saying that terms such as sadism, masochism, flagellation, etc. have adopted more common meanings without the sexual connotation attached thereto.

Therefore, appellant submits that a highly prejudicial error was committed in giving instructions 2, 3 and 4 to the jury. Appellant further submits that this error was compounded when the Court refused defendant's proposed instructions number 29 and 30, which appellant contends is an accurate statement of the law since deriving pleasure from any particular material is irrelevant and immaterial and in no way connected with the determination of obscenity under the laws of this State.

C. Appellant contends that the Court erred in refusing defendant's proposed instruction number 40 as it related to Count 3 of the complaint pertaining to a violation of the §311.5 of the Penal Code. Appellant contends that defendant's proposed instruction number 40 is an accurate reflection of this Court's construction of §311.5 as contained in the case of *People v. John Amslow, etc.*, CR A 6960, decided by this Court September 20, 1966; and that the failure of the Trial Court to so instruct the jury was prejudicial error.

## IV

## THERE WAS ABSOLUTELY NO EVIDENCE FROM WHICH THE JURY COULD FIND THE REQUISITE ELEMENTS OF THE TEST OF OBSCENITY AS ENUNCIATED IN §311(a) OF THE PENAL CODE; I.E., NO CORPUS DELECTI WAS ESTABLISHED.

§311(a) of the Penal Code reads as follows:

> "'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

Breaking this definition down into its essential elements, we can see that it is multipartite in composition, with the elements breaking down as follows:

1. To the average person
2. Applying contemporary standards
3. The predominant appeal of the matter, taken as a whole,
4. Is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion
5. Which goes substantially beyond customary limits of candor in description or representation of such matters
6. And is matter which is utterly without redeeming social importance.

There is no question that all of the above elements of obscenity must be proven beyond a reasonably doubt by the prosecution, and that there must be a coalescence of each and every one of these elements in order for a tryer of fact to be able to make a finding of obscenity. *Landau v. Fording,* 245 ACA 872; *U.S. v. Klaw,* 350 Fed 2d, 155.

The requirement of proof is more sensitive and more particularly required when the alleged obscenity has to do with deviant groups. (Klaw, p. 166, "and if proof of prurient stimulation and response is generally important, it is particularly important and necessary when the prurient interest may be that of a deviant segment of society, whose reactions are hardly a matter of common knowledge."). There is no rule of res ipsa loquitur in the field of obscenity where first amendment privileges are involved. Where such is done, the only conclusion that can be reached is that the jurors would be lfet to speculate, and this the First Amendment to the United States Constitution would not countenance. As was stated by the *Klaw* Court at p. 167: "Whatever the value of mere "autopical" evidence in other contexts, it should not readily be countenanced in this area. Otherwise, too easily the government's test might allow a jury to equate patent offensiveness to prurient appeal, thus obliterating the conjunction that has been thought indispensable."

Here, again, the Court makes reference to the fact that prurient appeal alone is not sufficient. In other words, the Klaw Court states at p. 164: "In addition to its appeal to 'prurient interest', proscribable 'obscenity' must be 'utterly without redeeming social importance'. . . . It must go 'substantially beyond the

customary limits of candor in description or representation' . . . It must be characterized by 'patent offensiveness'. . . . In brief, it is 'hard-core pornography'. . . .

The Klaw Court again reiterates the necessity for the conjunction of several elements at p. 164 where they say. "Thus, material is proscribable 'obscenity' or hard-core pornography, if it has the requisite prurient appeal, *and* if it so exceeds customary candor as to be patently offensive, *unless* it has *any* redeeming social importance." They go on to say: "However, the absence of artistic or literary value or other value of social consequence does not, without more, lead to a finding of proscribable 'obscenity'. Such qualities would merely insulate what might otherwise be proscribable due to its offensiveness and prurient appeal."

Summing up, each element must come together at one time and be proved by the prosecution, by evidence, in order for a finding of obscenity to be had of any given piece of material. A search of the record in the instant case will show an utter lack of such evidence. As a matter of fact, the only evidence offered by the People was the testimony of Dr. Marcus Crahan, and his evidence related only to whether or not there was an appeal to the prurient interest of a deviant group. No other evidence as to any of the other requisite elements was offered by the people.

At this point, appellant wishes to assign as error the allowing of a particularly highly prejudicial line of questioning to the doctor, commencing at line 15, page 277 of the Reporter's Transcript on Appeal, and ending with line 12, page 278, as follows:

"Q Doctor, do one of these people who are deviates who have habit patterns as sadists, mashochists, fla-

gellants, homosexuals, whatever it might be, do a lot of them, are they able, in their daily lives, to suppress their desires to participate in this type of an act?

MR. JACOBSON: I object. It is not material to any of the issues.

THE COURT: Overruled.

THE WITNESS: Yes. They are frequently able to suppress their desires.

BY MR. ALEX:

Q Doctor, from your experience, is there any likelihood that a type of book such as People's Number 4, or the "Bondage Cabin," or "Flagella," and/or the movie, "The Mad Count", or, "The Count," People's Number 5, would this have any—these types of, seeing or reading these types of books and movies, would it have any tendency to cause a person who is a deviate, who usually suppresses his activity, to come out in the open and actually take some overt action in regard to his deviation?

A Yes, I think it would excite his pattern, whatever it might be, by removing some inhibitions that were holding it in control.

MR ALEX: Nothing further. Cross examine."

This question, which was allowed to be asked over defense objection, certainly has no materiality or relevancy to any of the issues of obscenity, since it is not requisite under the law of this State to prove overt conduct as a result of the alleged obscene utterances. Therefore, such a question can only be assumed to have been asked for the purpose of creating bias and prejudice on behalf of the jury, and certainly it is clear from the very nature of the question and answer that such was its obvious result.

Therefore, appellant respectfully submits that no corpus delecti was established at any time.

## V

## THERE WAS NO EVIDENCE FROM WHICH THE JURY COULD FIND THAT A VIOLATION OF SECTION 311.5 OF THE PENAL CODE HAD BEEN MADE BY THE MATERIAL INVOLVED IN COUNT 3 OF THE AMENDED COMPLAINT; I.E.: NO CORPUS DELECTI WAS ESTABLISHED FOR COUNT 3.

In that regard, appellant incorporates herein by reference its argument as it related to the preceding point for Counts 1 and 2, except that as to Count 3, there was no evidence through any witness or of any type, nature, or description, that the advertising brochure met any of the requisites of §311.5. On that ground, appellant respectfully submits that no corpus delecti was established.

## VI

## THERE WAS NO COMPETENT EVIDENCE FROM WHICH THE JURY COULD FIND THAT THE DEFENDANT HAD KNOWLEDGE THAT THE MATERIAL WAS OBSCENE AS REQUIRED BY §311(a) OF THE PENAL CODE OR THAT THE REQUIRED ELEMENT OF SCIENTER WAS ESTABLISHED BY ANY COMPETENT EVIDENCE AT ALL.

§311(e) of the Penal Code states:

> "'Knowingly' means having knowledge that the matter is obscene."

An entire search of the record as contained in the Reporter's Transcript on Appeal will reveal to this Honorable Court that the prosecution offered no evidence whatsoever that the defendant, in fact, knew

that any of the material involved was obscene. As a matter of fact, the laborious task of judges, jurors and lawyers in this field would point out that such a determination by a layman is virtually impossible; be that as it may, that is no reason for doing away with that essential requisite.

## CONCLUSION

On the basis of all of the foregoing, and on the basis of all of the points raised on appellant's statement on appeal heretofore filed, appellant respectfully submits that the convictions on Counts 1, 2 and 3 in the Municipal Court below should be reversed.

Respectfully submitted,

ATKINS & JACOBSON

By Burton C. Jackson

Attorneys for defendant and appellant.

## SUBJECT INDEX


Page

Statement of Facts ..... 1

Argument ..... 2

I

In Regard to Counts I and II of the Complaint, Certiorari Should Be Denied Because the Material in Question Constitutes Hard-Core Pornography ..... 2

II

In Regard to Counts I and II of the Complaint, Certiorari Should Be Denied Because, Assuming, Without Conceding, That This Is a Close Case, Evidence of Pandering Requires a Finding That the Materials in Question Are Obscene ..... 5

III

In Regard to Count III of the Complaint, Certiorari Should Be Denied Since There Is No Substantial Federal Question Presented by the Petition ..... 7

Conclusion ..... 10

Appendix. Statement of Facts ..... App. p. 1

## TABLE OF AUTHORITIES CITED


| Cases | Page |
|---|---|
| Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 | 6 |
| Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 8 L.Ed.2d 1094 | 10 |
| Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 | 5, 6, 10 |
| Kirby v. Municipal Court, 237 Cal.App.2d 335 | 7 |
| Mishkin v. New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 | 4, 10 |
| People v. Noroff, 67 A.C. 814 | 6 |
| People v. Tierney, CR A 6922 (1967) | 7, 8, 9 |
| Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 | 10 |
| Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 | 9 |
| **Statutes** | |
| California Penal Code, Sec. 311.2 | 7, 8 |
| California Penal Code, Sec. 311.5 | 7, 8, 9 |
| United States Constitution, First Amendment | 4, 9 |
| United States Constitution, Fourteenth Amendment | 9 |

IN THE

# Supreme Court of the United States

October Term, 1967
No. 729

SAMUEL RATNER,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent*

## Brief for Respondent in Opposition to Petition for Writ of Certiorari

### STATEMENT OF FACTS

We have set forth as an appendix to this brief a detailed statement of facts supporting the judgment, with specific transcript references. In order, however, to aid this Court in understanding the evidence and contentions of the parties, we have prepared below a summary of this detailed statement of facts insofar as the evidence would be relevant to the issues presented by the petitioner for writ of certiorari.

The Petitioner ran a mail-order business in which he purchased mailing lists and indiscriminately sent out advertising brochures to persons on the lists (Rep. Tr. p. 217.)[1] The result of such indiscriminate mailing

[1] "Rep. Tr." is an abbreviation for the reporter's transcript of the evidence presented in the tiral court. The reporter's

(This footnote is continued on the next page)

led to the sending of an advertising brochure to a woman named Mrs. Whaley, whose name may have been obtained through the subscriber lists of *Playboy* magazine. (Rep. Tr. pp. 7, 14, 15.) Mrs. Whaley had never ordered nor solicited any of the materials offered by the defendant Ratner. (Rep. Tr. p. 14.) As a result of a report registered by Mrs. Whaley's husband, the matter was investigated by a police agency. (Rep. Tr. p. 6.)

Count III of the complaint was based upon the advertising brochure sent to Mrs. Whaley which offered for sale among other items, a book entitled "Bondage Cabin" and a movie entitled "The Court." (See People's Exhibit 2.) The book and the movie were the bases of Counts I and II of the complaint, respectively. The advertising brochure which offered these two materials was sent to at least 50,000 people and its purpose was to act as a "scam." (Rep. Tr. pp. 206, 222, 224.) A scam, as explained by the defendant himself, was designed to be deemed an offering of hard-core pornography, since the people who receiving the mailing would feel that no one would sell anything that was not hard-core pornography for the price that was quoted. (Rep. Tr. pp. 208, 209, 225.) The petitioner stated that there were people who would enjoy the type of thing such as the book, "Bondage Cabin." (Rep. Tr. pp. 211, 213.)

---

transcript is in the custody of the Clerk of the Appellate Department of the Superior Court for the County of Los Angeles, at the Los Angeles County Courthouse, 111 N. Hill Street, Los Angeles, California 90012. The exhibits which were introduced in the trial court are in the custody of the Clerk of the Municipal Court of the El Monte Judicial District, County of Los Angeles, 11301 East Valley Boulevard, El Monte, California 91231.

Dr. Crahan, a physician who was the People's witness, and was on a psychiatric panel of the California Department of Mental Hygiene and the Los Angeles Superior Court, testified that "Bondage Cabin" and "The Count" would excite abnormal emotions and appeal to the prurient interest of abnormal people such as masochists or sadists. (Rep. Tr. pp. 274, 277.) Dr. Polos, a psychiatrist who testified for the defense, testified that "Bondage Cabin" would appeal sexually to mentally ill persons, such as a sadist or a masochist. (Rep. Tr. p. 327.) They both testified that neither the book nor the film had redeeming social value. (Rep. Tr. pp. 292, 325, 326.) Dr. Crahan specifically testified that books such as "Bondage Cabin" and films such as "The Count" would have a tendency to cause a person who was a deviate to take some overt action in regard to his deviation. (Rep. Tr. p. 278.) Material of this type would excite the pattern of the deviate by removing some inhibitions that would hold his deviation under control. (Rep. Tr. p. 278.)

In addition, the jury, upon the evidence presented to them, could properly have inferred that petitioner specifically conceived and marketed his materials for such sexually deviant groups, since petitioner himself participated in the preparation of some of these materials, participated in the preparation of advertising matter designed to appeal to deviant groups, and was aware of the fact that there were people of this kind who enjoyed this type of thing, and to whom he offered the material he promoted. (Rep. Tr. pp. 153, 154, 158, 212, 213.)

## ARGUMENT

### I

### IN REGARD TO COUNTS I AND II OF THE COMPLAINT, CERTIORARI SHOULD BE DENIED BECAUSE THE MATERIAL IN QUESTION CONSTITUTES HARD-CORE PORNOGRAPHY

It is clear from the evidence that the appeal of the book "Bondage Cabin" and the movie "The Count" must be judged in terms of their effect upon those groups of persons who formed the deviant sexual groups known as masochists and sadists. These two deviant sexual groups are two of the "prominent types" recognized in the reference work referred to by this Court in *Mishkin v. New York,* 383 U.S. 502, 509, fn. 8, 86 S.Ct. 958, 964, fn. 8, 16 L.Ed.2d 56, 62, fn. 8 (1966) and, as was done in *Mishkin,* are two of the groups as to whom the appeal of this type of material can be assessed in light of the sexual interests of these intended and probable recipient groups. Judged by its appeal to those deviant groups, and when compared to the material in *Mishkin v. New York,* the evidence in this case supports a judicial finding that the book and the movie, independent of any pandering aspects of this case, constitute hard-core pornography and are not protected by the First Amendment.

## II

## IN REGARD TO COUNTS I AND II OF THE COMPLAINT, CERTIORARI SHOULD BE DENIED BECAUSE, ASSUMING, WITHOUT CONCEDING, THAT THIS IS A CLOSE CASE, EVIDENCE OF PANDERING REQUIRES A FINDING THAT THE MATERIALS IN QUESTION ARE OBSCENE

As noted in Part I of our Argument, we contend that the materials in question are hard-core pornography on their face in light of the evidence presented at the trial. Assuming, without conceding, that if this Court were to conclude that the materials were not hard-core pornography, there is sufficient evidence of pandering to justify a finding that the materials in question are obscene. Such evidence of pandering may, in a close case, "be probative with respect to the nature of the material in question and thus satisfy the *Roth* test." (*Ginzburg v. United States,* 383 U.S. 463, 474, 86 S.Ct. 942, 949, 16 L.Ed.2d 31, 40 [1966].)

As stated in *Ginzburg,* 383 U.S. at 475-476; 86 S.Ct. at 950; 16 L.Ed.2d at 41:

> "Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation."

In the instant case there is substantial evidence of defendant's "pandering" and emphasis solely on the sexually provocative aspects of his books and films. The advertising brochure; the role of such brochures as scams, as expressly stated by the petitioner; the books which are Exhibits 15 to 20; and the photographs (Exhibits 21 to 23), in addition to the book and film in question, constitute evidence of such emphasis. Under the *Ginzburg* case, *supra,* the material can be viewed against this background of commercial exploitation of erotica solely for the sake of their prurient appeal.[2]

Viewed against this background one can only conclude that material constitutes hard-core pornography, which is the exact conclusion that petitioner himself desired the public to draw.

---

[2]It should be noted that the California Supreme Court recently indicated that the concept of pandering is not part of the California statutory scheme. See *People v. Noroff,* 67 A.C. 814, 816 (1967). Such a conclusion does not prevent this Court from deciding that under federal constitutional standards as established by this Court in Ginzburg, the matter is obscene even though such standards are not the basis upon which the state courts would draw this conclusion. See *Cooper v. California,* 386 U.S. 58, 61, 87 S.Ct. 788, 790, 17 L.Ed.2d 730, 733 (1967).

## III

## IN REGARD TO COUNT III OF THE COMPLAINT, CERTIORARI SHOULD BE DENIED SINCE THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THE PETITION

Count III of the complaint charges a violation of California Penal Code, section 311.5 and is therefore distinguishable from Counts I and II of the complaint which charges violations of California Penal Code, section 311.2. The latter section is based upon the dissemination of obscene matter, whereas the former section is based upon the dissemination of advertising which purports to hold out matter as obscene. The petition herein does not attack the constitutionality of, nor the construction placed by the California courts upon California Penal Code, section 311.5. The constitutionality of that section was upheld in *Kirby v. Municipal Court,* 237 Cal.App.2d 335 (1965). The construction to be placed upon that section of the Penal Code was announced in *People v. Tierney,* CR A 6922 (1967) (a decision of the Appellate Department of the Superior of the State of California for the County of Los Angeles), wherein the court stated:

> "There is no issue in this case whether any material is obscene. *Thus the constitutional issue present in obscenity cases, upon which the trial judge may make an independent ruling, is absent here.* Instead the issue is whether the material is 'held out . . . to be obscene.' Section 311.5 Penal Code. This issue of fact should be decided by the jury under proper instructions defining obscenity." (Emphasis added.)

This interpretation of California Penal Code, section 311.5 in *People v. Tierney* was relied upon in the instant case since in the "Order Certifying Cause to Court of Appeal" made by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles in the instant case, the Appellate Department stated:

> "By this court's judgment entered June 8, 1967, affirming without opposition the judgment of conviction on all three counts charged, we held . . . on Count III that the materials advertised need not in fact be obscene as long as they are represented or held out to be obscene, following this court's holding in *People v. Tierney* (1967), CR. A. 6922." (Petition, Appendix A, pp. 2-3.)

Based upon the authorities in California, as noted above, it is clear that the issue in a case charging a violation of California Penal Code, section 311.5 (as distinguished from a violation of California Penal Code section 311.2) is not whether the material disseminated is obscene, but rather what did the defendant intend a reasonable man to conclude that he, the defendant, was offering to the average recipient of the advertisement. In other words, it is necessary for the trier of fact to determine what a reasonable man would believe the effect of the advertisement would be upon the average recipient of the advertisement, *i.e.* what interpretation would the average recipient place upon the advertisement. This issue poses a problem of intent rather than content, and is more similar to the

factual type of issues customarily submitted to the jury than to the "constitutional fact" issues which must eventually be decided in obscenity cases. Of course, in making this determination the jury must consider the definition of obscenity in determining whether or not the reasonable man could infer that the advertisement offered obscene matter. However, the mere fact that the jury must be instructed as to the definition of obscenity (see opinion in *People v. Tierney,* quoted above) does not make this issue a matter for constitutional adjudication under the First Amendment.

Having thus seen that petitioner makes no attack upon California's interpretation of Penal Code, section 311.5, it is clear that his request for certiorari as to Count III does not present constitutional issues under the First Amendment. Petitioner's argument regarding the sufficiency of evidence as to Count III must be relegated to a violation of the Fourteenth Amendment, based on the contention that there is no evidence whatsoever supporting the judgment. (See *Thompson v. City of Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L. Ed.2d 654 [1960].)

We contend that the evidence adequately supports an inference that the advertising brochure which is the subject matter of Count III of the complaint, on its face and in accord with the purpose for which petitioner sought it to be used (as a "scam"), represented and held out that the items offered for sale were obscene.

## CONCLUSION

This Court recently has reversed a number of decisions on the basis of *Redrup v. New York,* 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967). If this Court believes that there is any merit in the instant petition for writ of certiorari (and we contend there is none whatsoever), then this case should not be disposed of in as summary a fashion since, as distinguished from *Redrup* and its progeny, there was substantial evidence of pandering and of an assault upon individual privacy by dissemination in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to petitioner's advertisements. Furthermore, the material itself is so comparable to that passed upon by this Court in *Mishkin v. New York,* 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966), that if there is to be any difference in result, the states should be offered some guidelines so that they can properly apply the constitutional distinctions found by this Court.

Recently Justice Black wrote that no one, including the members of this Court, can possibly know what is or is not obscene or libelous under its decisions. (See *Curtis Publishing Co. v. Butts,* 388 U.S. 130, at 171; 87 S.Ct. 1975, at 2000; 18 L.Ed.2d 1094, at 1120-1121 (1967). In this case the prosecution followed to the best of its ability the concepts established by *Mishkin* and *Ginzburg.* If the Court reaches a different conclusion on this petition it is respectfully

urged that clear guildelines should be established to assist those who earnestly attempt to follow constitutional mandate in this most difficult area.

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS C. LYNCH,
*Attorney General,*
*State of California,*

GORDON RINGER,
*Assistant Attorney General,*

EVELLE J. YOUNGER,
*District Attorney,*
*County of Los Angeles,*

HARRY WOOD,
*Chief, Appellate Division,*

HARRY B. SONDHEIM,
ROBERT LEDERMAN,
*Deputy District Attorneys,*
*Attorneys for Respondent.*

## APPENDIX

### Statement of Facts

In this case the following evidence and testimony was presented in the trial court in support of the judgment:

John L. Whaley testified that in March and April, 1966, he was living at 11609 East Asher Street in El Monte, California. Mr. Whaley is a police officer for the City of Los Angeles. (Rep. Tr. pp. 4-5.) Mr. Whaley first saw the envelope which is People's Exhibit 1 on March 23, 1966 in his mailbox at 11609 East Asher. He opened this envelope. (Rep. Tr. pp. 5-6.) Mrs. Whaley saw Exhibits 1 and 2 when they came to her home. (Rep. Tr. pp. 13-14.) In regard to the typed material (Exhibit 2), Mr. Whaley turned it over to the Los Angeles Police Administrative Vice Division. (Rep. Tr. p. 6.) Mr. Whaley saw Exhibit 3, a large manila envelope, People's Exhibit 4, a booklet entitled "Bondage Cabin," and People's Exhibit 5, a small white box containing a film, "The Count," on April 15, 1966 at 11609 East Asher. He opened the envelope up and the book marked Exhibit 4, and the box containing an eight-millimeter film (Exhibit 5), were inside it. He turned these over to Officer Shaidell and Deputy Sheriff Serio. (Rep. Tr. pp. 7-8.)

Mrs. Vera Whaley testified that he is a school teacher; she has seen the envelope marked Exhibit 3, addressed to Mrs. J. Whaley when it was in a sealed condition. (Rep. Tr. pp. 13-15.)

Donald D. Shaidell testified that he is a police officer for the City of Los Angeles assigned to Administrative Vice Division, the Pornography Unit. (Rep. Tr. p.

21.) Officer Shaidell first saw Exhibits 1 and 2 when they were brought to his attention in the Administrative Vice Division of the Los Angeles Police Department by Officer Whaley on March 23, 1966. He then contacted Michael Serio in the Los Angeles Sheriff's Department. Officer Shaidell observed Exhibits 3, 4 and 5 at 11609 Asher Street in El Monte. The envelope was sealed at that time. He saw Officer Whaley open Exhibit 3, and Exhibits 4 and 5 were inside the envelope. (Rep. Tr. pp. 21-23.)

When Officer Shaidell first saw the advertising brochure, Exhibit 2, jointly with Michael Serio, they ascertained who is assigned for Post Office Box No. 38385. They ascertained to whom the Pitney-Bowes postage meter, with postage meter number 396449, was registered; and they also secured documents from the City Clerk's Office for the fictitious name of "Esoteria." (Rep. Tr. pp. 23-24.) People's Exhibit Number 6 consists of a photostatic copy of the front of an envelope addressed to "Esoteria," P.O. Box 35385, Los Angeles, California, 90035, with the name Mrs. J. Whaley, and address of 11609 Asher Street, El Monte, California, in the upper left-hand corner, a photostatic copy of a money order drawn on the Sunset-Echo Park Branch of the Bank of America, No. 31839000, dated April 8, 1966, payable to the order of "Esoteria," in the sum of $28.95, with purchaser's signature purporting to be that of J. Whaley, attached to which is a purchaser's receipt for money order. Also on Exhibit 6 is an order form on which an "X" appears before "M.O." in the amount of $28.95 for the items listed below, which appear to be "F-9 The Mad Count and His Manacled Maids" and "B-3 Bond-

age Cabin," with a signature and address of Mrs. J. Whaley, 11609 E. Asher Street, El Monte, California below.

People's Exhibit 7 consists of a purchaser's receipt for money order number 31839000 in the sum of $28.95. The money order was purchased by Deputy Serio in the presence of Officer Shaidell; the writing which is contained on the order blank and also on the money order receipt (Exhibit 7) is identical with the receipt that is shown on the money order in Exhibit 6. (Rep. Tr. pp. 24-26.)

The check marks on Exhibit 2, the advertising brochure, at B-3, "Bondage Cabin" and also a check mark on F-9, a film, "The Mad Count and His Manacled Maids," were placed on there to indicate the items purchased by Officer Shaidell and Deputy Serio. The items checked off on the brochure are the items which were ordered in the order form in Exhibit 6. The money order was made out in the sum of $28.95 because the film, "The Mad Count and His Manacled Maids" was $25.00, and the book, "Bondage Cabin" was $3.95. (Rep. Tr. pp. 27-28.)

People's Exhibit 8 is a certificate of a corporation doing business under fictitious name dated January 20, 1966 with the corporation being Wyngate and Bevins, Inc., Samuel Ratner, President, and which lists Esoteria Company among the fictitious firm names.

Bernadine Ellis testified that she is a post office clerk at the Preuss Station on Robertson, off of Pico, Los Angeles. (Rep. Tr. pp. 33-34.) P.O. Box Number 35385 is located at her station. (Rep. Tr. p. 35.) Exhibit 9 consists of an application for post office box number 35385 with the signature of applicant being

"Sam Ratner," with date of opening being June 10, 1964. Mrs. Ellis rented the box to the defendant on June 10, 1964. The box lists "Esoteria" as among the persons entitled to receive mail. Mr. Ratner had the box in the Spring of 1966. (Rep. Tr. pp. 37-38.) Mr. Ratner paid for postage due on mail addressed to box number 35385. (Rep. Tr. p. 39.)

Robert J. Boyle testified that he was a sales representative for Pitney-Bowes, Inc., in which capacity he wrote a contract for a postage meter to be used in Mr. Ratner's mailing. (Rep. Tr. pp. 44-46.) People's Exhibit 10 is a photostatic copy of a contract, an equipment movment report, and an installation form, together with other documents Mr. Boyle identified the postal meter rental agreement in Exhibit 10 as being filled out by him, and signed by defendant. (Rep. Tr pp. 49-50.) Meter number 342959 was inserted as part of this contract. (Rep. Tr. p. 52.) People's Exhibit 11 consists of a Pitney-Bowes meter and machine. The meter number on this meter is 396449, and it is owned by Pitney-Bowes, Inc. (Rep. Tr. p. 54.) A person would not enter into a new contract when he moved from city to city, but he would have a new meter assigned to him under the same contract. (Rep. Tr. p. 56.)

William E. Greve testifed that he is a service representative from Pitney-Bowes, and as such he has serviced and taken care of meter number 396449 at 919 North Fairfax, Los Angeles. He has taken care of problems in connection with this machine twice. Mr. Greve demonstrated and put in new equipment there on March 17, 1966. People's Exhibit 11 is the meter with number 396449. (Rep. Tr. pp. 57-58.) Mr. Greve has checked the records in regard to the meter

numbers of the Ratner account, and they have a different number than what existed on the original installation date, because they moved from one city into another city, and this requires a different postage meter. As to the number on People's Exhibit 10, meter number 342959, another number was subsequently given to this particular contract as a result of the account moving to a different city. (Rep. Tr. pp. 59-60.)

People's Exhibit 12 is a change of user's name and address report which is dated January 10, 1966, which shows a change for Prima Book Inc. from 1904 Arlington Avenue to 919 North Fairfax with the machine serial number being 396449. Exhibit 13 is an invoice, equipment movement report and an installation and pickup document. Exhibit 14 is an equipment movement report, a conditional sales contract and three installation forms. Mr. Greve filled out these forms. The customer's meter number was 396449 and the installation of the new machines was at 919 North Fairfax. (Rep. Tr. p. 64; Exhibit 14.) Two of the forms in Exhibit 14 were signed by Anne Miller. (Rep. Tr. p. 64.)

Michael J. Serio testified that he is detached from the Sheriff's Office at the present time and now is with the Department of Justice, State of California. (Rep. Tr. p. 68.) In Exhibit 6, Mr. Serio purchased the money order at the Echo Park and Sunset Boulevard Branch of the Bank of America. He prepared the envelope addressed to Esoteria, and completed the order blank ordering the film and the book, and he signed the signatures on the money order, representing himself to be Mrs. J. Whaley. (Rep. Tr p. 69.) On April 12, 1966, he inserted the order blank and the money order in the envelope, and detached the pur-

chase receipt stub (Exhibit 7) and deposited the envelope in a mailbox. (Rep. Tr. p. 70.)

Eugene Dossi testified he is a sergeant of police for the City of Los Angeles attached to the Administrative Vice Division. (Rep. Tr. p. 73.) He is one of the arresting officers in the case. When he went to 919 North Fairfax, the location of arrest, he had a warrant from the Municipal Court in Los Angeles. 919 North Fairfax is a residential type structure in a business area, a wood frame building. It is approximately 10 or 15 feet from the sidewalk. (Rep. Tr. p. 74. ) The arrest occurred in April, 1966. (Rep. Tr. p. 75.)

Inside the location of arrest, there were numerous cardboard cartons with envelopes and other materials; there were books in various cartons throughout the front room portion. There were hi-fi records in their containers. Also there were materials that were used to mail items and to secure items when they were being mailed. (Rep. Tr. pp. 77-78.) Exhibit 11 was attached to the machine that was used in addressing envelopes. (Rep. Tr. p. 79.)

Officer Dossi took out a copy of each booklet that was in certain cartons, and he took photographs from shelves in the back room. (Rep. Tr. p. 79.) People's Exhibit 15 is a book named "Esoteria"; People's Exhibit 16 is a booklet entitled "Spanked Female"; People's Exhibit 17 is a book entitled "Punishment Club"; Exhibit 18 is a book entitled "Bondage Bride of the Baron"; Exhibit 19 is a booklet entitled "Diary of a Dominated Male"; and Exhibit 20 is a booklet entitled "The Seat of the Trouble." In regard to the books (Exhibits 15 through 20), the officer removed such books from the location where Mr. Ratner

was arrested. He turned the material which he secured from the Fairfax location over to Officer Shaidell. In addition Officer Dossi gave to Officer Shaidell two photographs of each photograph which he removed and one record which he removed from that location. (Rep. Tr. pp. 80-81.)

People's Exhibit 21 is a picture entitled "Fifteen Male Nudists at Home." Exhibit 22 consists of nine pictures depicting males and females. Exhibit 23 is a picture of a man with a beard and a paddle in his hand, bending over a partially clad female.

Mrs. Loretta Anne Miller testified that in the Spring of 1966 she worked for Mr. Ratner at 919 North Fairfax doing general office work. (Rep. Tr. p. 105.) She handled books bearing the titles of Exhibits 15 through 20, carting them from one room to another and mailing them. (Rep. Tr. pp. 109-110.) People's Exhibit 11 looks like the meter which she took to the Post Office to have reset. (Rep. Tr. p. 112.) She saw a box containing film similar to Exhibit 5 in a closet at 919 North Fairfax. (Rep. Tr. p. 116.)

Mrs. Miller testified later in the trial that she started working for Mr. Ratner last December [1965]. She has seen a book like Exhibit 15 before, as Mr. Ratner had this type of book on his premises, and he mailed out that type of book from his location. (Rep. Tr. pp. 200-201.) In regard to Exhibits 16 through 20, she has seen books like them, and Mr. Rattner dealt in these types of books. (Rep. Tr. pp. 201-203.) She has seen the book "Bondage Cabin," Exhibit 4, and Mr. Ratner dealt in that type of book. Rep. Tr. p. 203.) Her function with these types of books was to make sure they were mailed out. She mailed out thousands of these books. (Rep. Tr. pp. 203-204.)

In regard to Exhibit 5, the film entitled "The Mad Count and His Manacled Maids," defendant told her about this film. (Rep. Tr. p. 204.) Mr. Ratner said that the male model hadn't appeared and that his partner, Rocky Snyder, had agreed to be the Count in the film. (Rep. Tr. p. 205.) Mr. Ratner told her that the story of the film was that two girls were supposed to have come to look for a job, and one was jealous of the other one, and one girl beat the other, and then the other girl then beat the first girl, and then he ended up beating both of them. (Rep. Tr. p. 206.)

In regard to the advertising brochure, Exhibit 2, Mrs. Miller mailed approximately 50,000 of them. (Rep. Tr. p. 206.) She mailed out books like those which appear on the side of the brochure. (Rep. Tr. pp. 206-207.)

The cash, checks, and money orders which came in were addressed to various companies under Wyngate and Bevins. These companies were S. and D. Products, Esoteria, and Wyngate and Bevins. (Rep. Tr. pp. 207-208.) Mr. Ratner sent out various "scams." A scam is something which, when read by a person, would be deemed to be hard-core pornography, in view of the price that was quoted. The people who received the mailing would feel that no one would sell something that was not hard-core pornography for that price. (Rep. Tr. p. 208.) She learned the word "scam" from Sam Ratner. (Rep. Tr. p. 209.)

Wyngate and Bevins really was Sam and Rocky. (Rep. Tr. p. 209.) After Mrs. Miller was shown the initial procedure, Mr. Ratner told her anything which she had to know. (Rep. Tr. p. 211.)

In regard to whom a book with a story such as "Bondage Cabin" would appeal to, defendant said that

there were people that enjoy this type of thing. (Rep. Tr. pp. 211, 213.)

Mrs. Miller testified that defendant wrote Exhibit 15, the booklet entitled "Esoteria." Defendant received the ads and typed them up. There are about five phony ads in that booklet. (Rep. Tr. pp. 213-214.)

Mrs. Miller has seen pictures, such as those in the Exhibit 22 series at 919 North Fairfax. Such pictures were put on the boxes of film that were to be sold retail in stores, as was the picture which is Exhibit 21. (Rep. Tr. pp. 215-216.)

In regard to mailing lists, the amounts paid were anywhere from $20.00 a hundred names up to $1.00 a name. The list at $1.00 a name consisted of known buyers. (Rep. Tr. p. 219.)

Officer Shaidell testified that the books which are Exhibits 15 through 20 were given to him by Sergeant Dossi, and he put them in a filing cabinet located in his office under "Ratner." (Rep. Tr. pp. 144-145.)

Carl Schwartz testified that he is in the printing business, known as Carlen Press. He knows the defendant as a personal friend, and Mr. Schwartz has done some printing for defendant's company for a year and a half to two years. Mr. Schwartz has been the advertising brochure which is Exhibit 2 before and he printed this brochure at the request of Mr. Ratner. He printed roughly four to five thousand of these brochures. (Rep. Tr. pp. 151-153.) Mr. Schwartz printed Exhibit 23 for the company of Wyngate and Bevins. Exhibit 23 is a part of the brochure which is Exhibit 2. In regard to the printing of the brochure, he is furnished with "camera-ready copy" which is then composited together. Mr. Ratner, acting in behalf of Wyn-

gate and Bevins, furnished him with the camera-ready copy. Exhibit 23 is the same picture which is shown in the lower left-hand corner of Exhibit 2. (Rep. Tr. pp. 153-154.) Mr. Schwartz is familiar with the picture which is Exhibit 22-A, which came out of a brochure which he printed. (Rep. Tr. p. 155.)

Mr. Schwartz printed the book "Esoteria," which is Exhibit 15, for Mr. Ratner, and he believes there were 1500 printed. (Rep. Tr. pp. 157-158.)

When he was going to print a book Mr. Schwartz would receive paste-downs exactly the way the book was to be printed. Mr. Schwartz takes a picture of the item and makes a plate. (Rep. Tr. p. 158.) The pictures that appear throughout the book were furnished to him by Mr. Ratner. The material on page 39 of Exhibit 15, including the "Esoteria, P.O. Box 35385" was supplied to him. (Rep. Tr. pp. 159-160.) Mr. Schwartz delivered some of the materials to 919 North Fairfax. (Rep. Tr. pp. 160-161.)

Harold Hippler is employed by the Sheriff's Department of the County of Los Angeles. (Rep. Tr. pp. 164-165.) Exhibit 4 was received in evidence (Rep. Tr. p. 177) and read to the jury by Mr. Hippler (Rep. Tr. p. 178.) Exhibit 5, the film, was received in evidence (Rep. Tr. p. 181) and shown to the jury. (Rep. Tr. p. 182.)

Torrance Eddy testified that he is a trainee operations officer of the Bank of America, Sunset-Echo Park Branch. He has access to the books and records of that branch. The money order, which is Exhibit 24, was obtained from the files of the cancelled money orders which are kept on file in the vault. The money order has been deposited to the account which is stamped on

the back. The fact that it is perforated with "Paid on 4-18-66," means that the order was paid. On the back as an endorsement of the order there appears the word "Esoteria," and below that "For Deposit Only, pay to the order of Security First National Bank, Wyngate and Bevins, Incorporated, 081-991." (Rep. Tr. pp. 193-194.)

Donald Schoof is a postal inspector for the United States Post Office Department who works out of the Los Angeles office. Exhibit 25, an application for a post office box on Form 1093, was written by Sam Ratner in his presence on April 5, 1962, with the exception of the places where Mr. Schoof's initials appear and the date. The two signatures were written by Sam Ratner, in his presence. Mr. Schoof showed the change-of-address card, which is Exhibit 26, to defendant, who identified the card as having been written by him. (Rep. Tr. pp. 195-198.)

Robert Venables testified that he is assistant manager for the Security-First National Bank, 7900 Melrose Avenue. He has the books and records of the bank available to him. He has seen the original of Exhibit 27, a photostatic copy of a signature card for a bank account before. The original is the authorization to open an account at his branch under the account name of Wyngate and Bevins. The account was opened on 9-3-65 by one of his clerks. It is for a mail order business and Sam Ratner and William Snyder are the names on the account. Sam is the president and William Snyder is the secretary-treasurer. The account was closed on May 27, 1966. (Rep. Tr. pp. 240-242.)

Sergeant Herbert L. Campbell testified that he is an examiner of questioned documents assigned to the Crime

Lab of the Los Angeles Sheriff's Department. A stipulation of his qualifications as to questioned documents was offered by the defense. It is Mr. Campbell's opinion that the Sam Ratner signatures appearing on Exhibits 25, 26 and 27 were all written by the same person. (Rep. Tr. pp. 243-244.)

Exhibits 15 through 20 were received in evidence. (Rep. Tr. p. 246.) Harold Hippler read Exhibit 15 to the jury. (Rep. Tr. p. 246.)

Marcus Crahan testified that he is a physician and is the medical director of the Sheriff's Department and is on the psychiatric panel of the Department of Mental Hygiene and the Superior Court. (Rep. Tr. p. 266.) Dr. Crahan has read and examined Exhibit 4, the book entitled "Bondage Cabin"; and he has viewed and examined the film called "The Count" (Rep. Tr. p. 269.) He defined sadism, its relation to sex, masochism, and flagellation. (Rep. Tr. pp. 270-272.) In regard to the book "Bondage Cabin," Dr. Crahan testified that he does not believe that this book is a literary object; that he doesn't think it was written for any purpose except to excite abnormal emotions in abnormal people. The abnormal groups that it was written to excite are certain homosexuals, masochists and sadists. The book would appeal to the prurient interest of these groups. The book has neither moral value, scientific value, nor literary value. (Rep. Tr. pp. 274-275.) Dr. Crahan has the same opinions as to the story "Flagella," which is a wholesale flagellation proposition. (Rep. Tr. p. 276.)

In regard to the film which is Exhibit 5, Dr. Crahan believes that it was a senseless beating of the posteriors of two women by a man. There was no rhyme nor rea-

son to the thing except just repetition of this beating with different instruments. (Rep. Tr. p. 276.) Dr. Crahan testified, "I think a person viewing it might want to maybe participate in this kind of behavior if he was abnormal, or if he was drunk, and went home, something like this." (Rep. Tr. p. 277.) The film would appeal to deviate groups. People who are deviates such as sadists, masochists, flagellants, or homosexuals are frequently able to suppress their desires. Books such as Exhibit 4, and films such as Exhibit 5, would have a tendency to cause a person who is a deviate to take some overt action in regard to his deviation. (Rep. Tr. pp. 277-278.) Such matter ". . . would excite his pattern, whatever it might be, by removing some inhibitions that were holding it in control." (Rep. Tr. p. 278.)

Lester D. Zabel read Exhibit 19, the book entitled "Diary of a Dominated Male" to the jury. (Rep. Tr. pp. 296-297.)

On cross-examination, Dr. Theodore Polos, a psyciatrist (Rep. Tr. p. 309) testified that he did not see any socially redeeming value in the book "Bondage Cabin" and in the film "The Count." (Rep. Tr. pp. 325-326.) He thinks the people who would purchase "Bondage Cabin" and would derive pleasure from it are people who are mentally ill. (Rep. Tr. p. 327.) A sadist or a masochist who reads this would get pleasure from it, sexually. (Rep. Tr. p. 328.)

Mr. Jacobson read Defendant's Exhibit D, Edgar Allan Poe's "The Pit and the Pendulum" to the jury, (Rep. Tr. p. 369.) Mr. Jacobson read Defendant's Exhibit G-1, the book "Dairy of a Furious Lash" to the jury. (Rep. Tr. pp. 403-404, 406.)

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 27 1968

IN THE

# Supreme Court of the United States

October Term, 1967
No. 729

SAMUEL RATNER,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

## Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

NORMAN R. ATKINS,
BURTON C. JACOBSON,
424 South Beverly Drive,
Beverly Hills, California,

RICHARD A. LAVINE,
121 South Beverly Drive,
Beverly Hills, California,

*Attorneys for Petitioner.*

Parker & Son, Inc., Law Printers, Los Angeles, Phone MA. 6-9171.

## SUBJECT INDEX

Page

I.

No Pandering Issue Is Presented in the Instant Litigation Because of the Recently Decided Case of People v. Noroff, 67 A.C. 814, Wherein the Supreme Court of the State of California Stated That California Law Does Not Include Any Issue of Pandering in an Obscenity Case Brought Under Section 311.2 of the California Penal Code ..... 2

## TABLE OF AUTHORITIES CITED


| Cases | Page |
|---|---|
| Chapman v. California, 87 S. Ct. 824, 386 U.S. 18 | 3 |
| Cooper v. California, 386 U.S. 58, 87 S. Ct. 788 | 3 |
| Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31 | 4 |
| Mishkin v. New York, 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56 | 4 |
| People v. Noroff, 67 A.C. 814 | 2, 3 |
| **Rules** | |
| Rules of the Supreme Court of the United States, Rule 24(4) | 1 |
| **Statutes** | |
| California Penal Code, Sec. 311.2 | 2 |
| United States Constitution, First Amendment | 3, 4 |

IN THE

# Supreme Court of the United States

October Term, 1967
No. 729

SAMUEL RATNER,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

## Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

Petitioner respectfully files this reply to Respondent's brief in opposition to the Petition for Writ of Certiorari pursuant to Rule 24(4) of the revised rules of the Supreme Court of the United States.

Petitioner in this reply will address himself only to the arguments first raised by Respondent beginning at Page 5 of his brief, under II, concerning the "pandering" aspects of the case. In so doing, petitioner states categorically that he in no way acquiesces to any of the arguments in other parts of the opposition of respondent, and states, in particular, that he in no way concedes the accuracy of respondent's statement of the evidence.[1]

[1]A glaring example of inaccuracy of the factual statement of the case appears on Page 2 of Respondent's brief in opposition, in which respondent states . . . "As explained by the defendant

(This footnote is continued on the next page)

## I.

**No Pandering Issue Is Presented in the Instant Litigation Because of the Recently Decided Case of People v. Noroff, 67 A.C. 814, Wherein the Supreme Court of the State of California Stated That California Law Does Not Include Any Issue of Pandering in an Obscenity Case Brought Under Section 311.2 of the California Penal Code.**

The instant litigation derives from a California State prosecution brought under Penal Code §311.2, which declares that obscene material is proscribed. At no place in §311.2 does the California Legislature declare that "pandering" or any word substantially similar constitutes a crime under the law of the State of California.

In the recent case of *People v. Noroff*, 67 A.C. 814 (1967), (decided since the affirmance of the within case by the Appellate Department of the Superior Court of the County of Los Angeles), the Supreme Court of the State of California stated clearly that "pandering" is not part of the law of the State of California, and did so in the following clearly enunciated language:

> "We cannot accept the People's argument, advanced for the first time on appeal, that the trial court should have permitted the prosecution to go to the jury with evidence bearing upon the defendant's 'pandering' of the magazine in question. First, the indictment did not charge the defendants with pandering; second the State Legislature has created no such crime."

---

himself . . ." leading one to believe that the defendant testified as to certain matters. The transcript of record will disclose that the defendant, at no time, took the stand and testified in the instant litigation.

Also, the Court amplified the statement made by the footnote number 3:

> "Earlier this year, the Attorney General advocated the amendment of the Penal Code to prohibit the offense of 'pandering'—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of . . . customers'. . . . To date, no such amendment has been enacted."

It will be seen therefrom that the instant litigation raises only the issue of obscenity vel non?

The Respondent argues in its footnote 2 on page 6 of its Brief in Opposition that *People v. Noroff, supra* in not controlling and that the United States Supreme Court could in spite of the holding of *People v. Noroff* declare that the "pandering" issue is involved in the instant litigation. The respondent's authority for such a statement is cited as the case of *Cooper v. California,* 386 U.S. 58, 61, 87 S. Ct. 788, 790 (1967). The case of *Cooper v. California* is simply inapposite. A reading of *Cooper v. California* and the related case of *Chapman v. California,* 87 S. Ct. 824, 386 U.S. 18, are clearly inappropriate because both cases dealt with the problem of the restriction by state law of federally created rights. The instant case involves the reverse. This case could not possibly involve the restriction of federally created rights by state law because the removal of the "pandering" aspect from the law of the State of California can only mitigate in favor of First

Amendment created rights to Free Speech, rather than against them.

*Mishkin v. New York,* 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56 [1966];

*Ginzburg v. United States,* 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31 [1966].

Respectfully submitted,

NORMAN R. ATKINS,
BURTON C. JACOBSON,
RICHARD A. LAVINE,
*Attorneys for Petitioner.*